Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BERWIND CORPORATION,

Petitioner,

v.

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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118 pp

QUESTION PRESENTED

Whether a federal statute or administrative determination can overrule this Court's judgment regarding the unconstitutional imposition of retroactive liability by holding a former coal mining company that stopped mining coal more than 30 years prior to the enactment of the Coal Industry Retiree Health Benefit Act of 1992 liable under the Act for approximately $56,000,000 to employees it last employed in 1962, even though this Court has held, in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), that in such circumstances it would be unconstitutional to impose such an enormous and severely retroactive liability.

LIST OF PARTIES

Petitioner Berwind Corporation was the plaintiff in the proceedings below. Respondents Kenneth S. Apfel in his capacity as Commissioner of Social Security; Michael H. Holland, William P. Hobgood, Marty D. Hudson, Thomas O.S. Rand, Elliot A. Segal, Carl E. Van Horn, Gail R. Wilensky as Trustees of the United Mine Workers of America Combined Benefit Fund; the United Mine Workers of America Combined Benefit Fund; Michael H. Holland, Marty D. Hudson, Elliot A. Segal, A. Frank Dunham as Trustees of the United Mine Workers of America 1992 Benefit Plan; and the United Mine Workers of America 1992 Benefit Plan were defendants in the proceedings below. Jo Anne B. Barnhart is currently the Commissioner of Social Security.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, petitioner, Berwind Corporation, states that it is a Pennsylvania corporation, that it has no parent corporation, and that no publicly held company owns 10% or more of the corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

Berwind Corporation ("Berwind") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals ("*Berwind III*") is reported at 307 F.3d 222 (3rd Cir. 2002), and is reprinted in the Appendix hereto at 1a-41a. An Order from the Court of Appeals amending its opinion (to substitute "Coal Act" for "Coat Act" in one sentence of the opinion) is reprinted in the Appendix hereto at 42a-44a.

The March 31, 2000, opinion of the District Court ("*Berwind I*") is reported at 94 F. Supp. 2d 597 (E.D.Pa. 2000) and is reprinted in the Appendix hereto at 45a-79a.

The September 15, 2000, opinion of the District Court, No. 98-5985, 2000 WL 1337112 ("*Berwind II*") (E.D.Pa. Sept. 15, 2000), is unreported. It is reprinted in the Appendix hereto at 80a-90a.

JURISDICTION

The Court of Appeals entered its judgment on October 2, 2002. The petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution is reproduced in the Appendix hereto at 91a.

The Coal Industry Retiree Health Benefit Act of 1992 is codified at 26 U.S.C. §§ 9701-22 and selective portions are reproduced in the Appendix hereto at 91a-93a. Selective portions of the Internal Revenue Code that are relevant to this case, 26 U.S.C. §§ 52, 1563(a), are reproduced in the Appendix hereto at 93a-94a.

The Administrative Procedure Act is codified at 5 U.S.C. § 701 *et seq.*, and selective portions are reproduced in the Appendix hereto at 95a-96a.

STATEMENT OF THE CASE

In 1992 Congress enacted the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9701, *et seq.* (the "Coal Act"). This Court has set out in detail the purpose of and history leading to the enactment of the Coal Act in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). In summary, the purpose was to rescue from insolvency the health benefit funds that had been established for union coal miners and their dependents through bargaining between the United Mine Workers of America ("UMWA") and the Bituminous Coal Miners' Association of America. *Id.* at 511-514. The statute, among other things, imposed retroactive liability on certain former coal mining companies by assigning to them responsibility for the health benefits of miners who had worked for them in the past. *See* 26 U.S.C. § 9706(a).

Pursuant to the statute, the Social Security Administration ("SSA"), which has responsibility for assigning retired miners and their dependents to coal companies and former coal companies under the Coal Act (*see* 26 U.S.C. § 9706(a)), assigned to a former coal mining company called Eastern Enterprises ("Eastern") miners whom Eastern had employed before it left the coal mining business in 1965. *Eastern Enterprises*, 524 U.S. at 516-517.

The total liability the SSA assigned to Eastern was in the range of $51,000,000 to $100,000,000, not discounted to present value. *Id.* at 529; Brief for Petitioner in *Eastern Enterprises*, 1997 WL 764448, *2; Brief for Respondent UMWA Combined Benefit Fund, *et al.*, in *Eastern Enterprises*, 1998 WL 42602, *46. Eastern brought suit claiming, among other things, that the Coal Act was unconstitutionally retroactive as applied to it. *See* Brief for Petitioner in *Eastern Enterprises*, 1997 WL 764448, *21-26.

Reversing a decision of the United States Court of Appeals for the First Circuit, this Court agreed with Eastern in *Eastern Enterprises*. Justice O'Connor wrote an opinion in which Justices Rehnquist, Scalia, and Thomas concurred, holding that the Coal Act as applied to Eastern violated the Takings Clause of the Fifth Amendment. *Eastern Enterprises*, 524 U.S. at 537. Justice Kennedy wrote an opinion that the imposition of Coal Act liability on Eastern was a violation of Due Process. *Id.* at 547. Both Justice O'Connor's and Justice Kennedy's opinions make clear that Congress may constitutionally impose retroactive liability in some circumstances, but not if the statute imposes "severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of the liability is substantially disproportionate to the parties' experience." *Id.* at 528-29 (O'Connor, J.); *see also id.* at 548-549 (Kennedy, J.).

In holding that the imposition of liability on Eastern constituted a taking, Justice O'Connor pointed out that it imposed a considerable financial burden on Eastern and that before the signing of the 1974 National Bituminous Coal Wage Agreement ("coal wage agreement"), which Eastern did not sign, Eastern could not have contemplated that it might be liable for the provision of lifetime benefits to miners and their dependents. *Id.* at 529-531. She said that Congress' solution to the problem of funding coal miners'

health benefits, while "understandable," impermissibly "singles out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused . . . ." *Id.* at 537. She concluded that "Eastern cannot be forced to bear the expense of lifetime health benefits for miners based on its activities decades before those benefits were promised." *Id.* In reaching the same conclusion, Justice Kennedy said the Coal Act imposed on Eastern "a retroactive effect of unprecedented scope." *Id.* at 549.

All five of the Justices who formed the majority discounted the fact that Eastern had owned a subsidiary corporation -- Eastern Associated Coal Corp. ("EACC") -- that conducted coal operations until 1987 and that had signed 1974 and later coal wage agreements. *Id.* at 530 (O'Connor, J.); *id.* at 547-550 (Kennedy, J.). Justice O'Connor noted that Eastern's liability bore no relationship to its ownership of EACC. *Id.* at 530. Justice Kennedy ignored the existence of EACC entirely. *Id.* at 547-550. Thus, the Justices who formed the majority in *Eastern* treated Eastern's relationship with EACC as constitutionally insignificant. *Id.* at 530; *id.* at 547-550. They declined to conclude that ownership of a subsidiary that mined coal eliminated the extreme retroactivity of imposing liability on Eastern for miners it had employed almost 30 years earlier. *Id.* at 530; *id.* at 547-550.

Petitioner, Berwind, is situated virtually identically to Eastern. Like Eastern, Berwind ceased mining operations long before the 1974 coal wage agreement made the first promise of lifetime benefits to UMWA miners. *Berwind I*, at App. 50a, 58a. In fact, Berwind stopped mining coal in 1962, three years earlier than Eastern did. *Id.* at App. 54a, 60a. Like Eastern, Berwind did not sign the watershed 1974 or any subsequent coal wage agreement. *Id.* at App. 54a,

58a. After 1962 Berwind never employed a UMWA miner in any capacity. *Berwind III*, at App. 11a. As with Eastern, the SSA assigned Berwind its former employees under section 9706(a)(3) of the Act. *Berwind I*, at App. 61a; *Eastern Enterprises*, 524 U.S. at 515, 517. Berwind is a closely held, family-owned corporation which has investments in a wide variety of businesses, none of which is engaged in the mining of coal. Most critically of all, Berwind's potential liability under the Coal Act is about $40,000,000 (discounted to present value) on account of miners it had employed before 1963. *Berwind III*, at App. 14a n.9 (Berwind has paid about $16,000,000 in premiums under the Coal Act; Berwind estimated in June 1998 that the present value of its future liability would be approximately $24,500,000). The undiscounted value of Berwind's total liability is approximately $56,000,000, within the range of Eastern's $51,000,000 to $100,000,000 undiscounted liability.

Given the virtually identical circumstances shared by Berwind and Eastern, Berwind should be treated in the same way. *See Anker Energy Corp. v. Consolidation Coal Co.*, 177 F.3d 161, 170 (3rd Cir. 1999) (*citing Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 659 (3rd Cir. 1999). On this basis, after this Court's decision in *Eastern Enterprises*, Berwind brought suit in the United States District Court for the Eastern District of Pennsylvania on November 12, 1998, seeking, among other things, a declaration that the Coal Act violates the Takings and Due Process Clauses of the Fifth Amendment as applied to Berwind and that the SSA had violated the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, by refusing to remove Berwind from the Coal Act rolls in the wake of *Eastern Enterprises*. *Berwind I*, at App. 46a-47a, 57a. The District Court agreed, disposing of the case by deciding several summary judgment motions, in the course of which it held that Berwind's situation is constitutionally

indistinguishable from that of Eastern: "[P]laintiff [Berwind] stands in a substantially identical position as Eastern with regard to the assignment of its own employees." *Id.* at App. 77a. The District Court reached this conclusion after noting, among other things, that Berwind "left the coal business before Eastern and also never signed the 1974 or any later NBCWA [coal wage agreement]." *Id.* at App. 58a.

The United States Court of Appeals for the Third Circuit reversed the District Court's judgment on this point. The Third Circuit rejected Berwind's argument that its situation is substantially identical to that of Eastern, and in doing so effectively elevated statutory provisions and an administrative determination above a constitutional determination of this Court. *Id.* at App. 27a. The court noted that in 1992, when Congress passed the Coal Act, Berwind owned the stock of a moribund subsidiary, Reitz Coal Company ("Reitz"), which had never been dissolved. *Id.* at App. 12a-13a. The court held that provisions of the Coal Act that made Berwind "related" to Reitz permitted the Coal Act to impose liabilities on Berwind which the court implicitly conceded would have been unconstitutional under *Eastern Enterprises* but for those provisions. *Id.* at App. 27a-28a (*citing* the "'related person' provisions," 26 U.S.C. § 9706(b)(1)(A)). Thus, the Third Circuit concluded that Congress has the power, by simply decreeing in 1992 that Berwind is "related" to its subsidiary, to impose liability upon Berwind in a factual situation with respect to which this Court had already held that the Constitution does not permit the imposition of liability. In doing so, the Third Circuit has held that statutory provisions (and an administrative determination by the SSA) can trump this Court's holding in the *Eastern Enterprises* case.

REASONS FOR ALLOWANCE OF THE WRIT

The Third Circuit has held that Congress and the SSA, through the "related person" provisions of the Coal Act, accomplished what this Court in *Eastern Enterprises* said Congress could not do: impose enormous retroactive liability on a former coal company for miners it had employed before 1963. The opinion of the court below stands for the untenable proposition that a federal statute and an administrative determination can nullify the effect of this Court's ruling on a constitutional issue.

I. EASTERN WAS NOT LIABLE TO MINERS IT HAD EMPLOYED BEFORE IT STOPPED MINING COAL BECAUSE, LIKE BERWIND, IT HAD NEVER PROMISED THEM LIFETIME BENEFITS

Eastern conducted extensive coal mining operations until the end of 1965 and signed each coal wage agreement between 1947 and 1964. *Eastern Enterprises*, 524 U.S. at 516. At the end of 1965, Eastern transferred its coal-related operations to a wholly-owned subsidiary, EACC, which it formed for that purpose. *Id.* EACC assumed all of Eastern's liabilities arising out of coal mining and became the successor to Eastern's coal business. *Id.*

Eastern retained its 100 percent stock ownership in EACC through an intermediate subsidiary corporation until 1987. *Id.* at 516. EACC signed the 1974 and later coal wage agreements. *Id.* at 566. During the period from 1966 to 1987 Eastern received dividends of more than $100 million from EACC. *Id.* at 516. In 1987 Eastern sold the stock of EACC to a third party. *Id.*

Following the enactment of the Coal Act in 1992, the Commissioner of the SSA assigned to Eastern over 1,000

retired miners who had worked for Eastern before 1966. *Id.* at 517. The Commissioner assigned those miners to Eastern pursuant to section 9706(a)(3) -- the same section under which the Commissioner has assigned Berwind its former miners. *Id.* at 515, 517; *Berwind I*, at App. 61a.

In its challenge to the Coal Act Eastern argued, among other things, that it was irrational for Congress to require it to pay lifetime health benefits for UMWA retirees when Eastern had never signed a coal wage agreement that promised such benefits. *Eastern Enterprises*, 524 U.S. at 551 n.2 (Stevens, J., dissenting). Eastern staked its argument on the fact that it had not signed the 1974 coal wage agreement, which was the first coal wage agreement that promised lifetime retiree health benefits. *Id.* This Court accepted Eastern's argument despite the fact that its wholly-owned subsidiary, EACC, had signed the 1974 coal wage agreement with the approval of their joint management. *See id.* at 566 (Breyer, J., dissenting).

II. BERWIND'S FACTS ARE SUBSTANTIALLY IDENTICAL TO, IF NOT MORE COMPELLING THAN, EASTERN'S

Like Eastern, Berwind ceased mining operations long before the 1974 coal wage agreement made the first promise of lifetime benefits to UMWA miners. *Berwind I*, at App. 50a, 58a. In fact, Berwind stopped mining coal in 1962, three years earlier than Eastern did. *Id.* at App. 54a, 60a. Like Eastern, Berwind did not sign the watershed 1974 or any subsequent coal wage agreement. *Id.* at App. 54a, 58a.

On January 31, 1963, Berwind became a shareholder in Reitz, and eventually it became the sole shareholder. *Id.* at App. 54a. Reitz had been an independent coal company from 1915 to 1963, and Berwind had had no ownership interest in it. After its acquisition by Berwind, Reitz did not

take over any of Berwind's closed mines but continued to mine coal in its own separate mines. *Id.*

In September of 1984, the UMWA declared a strike against Reitz which closed all of the Reitz mines. *Berwind III*, at App. 12a. Reitz was never again able to reach agreement with the UMWA, and its mines never reopened. *Id.* Reitz had stopped mining coal in 1984, but in 1992, when Congress passed the Coal Act, Berwind still owned the stock of Reitz, which had never been dissolved. *Id.*

Like Eastern, Berwind left the coal industry long before the UMWA Benefit Plans suffered their funding crisis and long before the coal industry made promises of lifetime benefits to miners. The severity of imposing retroactive liability on Berwind is equivalent to the severity of that sought to be imposed on Eastern. Berwind's total liability under the Coal Act, as of June of 1998, reduced to present value, was approximately $40,000,000. *Id.* at App. 14a n.9. The undiscounted value of Berwind's total liability is approximately $56,000,000, compared to between $51,000,000 and $100,000,000 for Eastern. *Eastern Enterprises*, 524 U.S. at 529; Brief for Petitioner in *Eastern Enterprises*, 1997 WL 764448, *2; Brief for Respondent UMWA Combined Benefit Fund, *et al.*, in *Eastern Enterprises*, 1998 WL 42602, *46. Thus, imposing liability upon Berwind under the Coal Act is just as "severe, disproportionate, and extremely retroactive" as it was in *Eastern Enterprises*. *Eastern Enterprises*, 524 U.S. at 538.

III. THE COAL ACT'S PROVISIONS THAT BERWIND'S OWNERSHIP OF REITZ MAKES THE COMPANIES "RELATED PERSONS" CANNOT CHANGE THE CONSTITUTIONAL ANALYSIS

The only factual distinction the Third Circuit made between Berwind's situation and Eastern's is that Berwind continued to hold the stock of Reitz until 1992, even though Reitz had stopped mining coal in 1984, whereas Eastern had sold the stock of EACC in 1987. *Berwind III*, at App. 27a-28a. The Coal Act provides that entities which were members of a "controlled group of corporations" on July 20, 1992, are "related persons." 26 U.S.C. § 9701(c)(2). Accordingly, Berwind and Reitz are "related persons," but Eastern and EACC were not. *Id.* at App. 13a, 27a-28a; 26 U.S.C. § 9701(c)(2)(B).[1] That, however, is a distinction without a constitutional difference. A statute -- the "related person" provisions -- cannot be used to override a constitutional decision of this Court.

The Third Circuit and the SSA, however, have chosen to apply the Coal Act's "related person" provisions to circumvent this Court's decision in *Eastern Enterprises*.

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[1] The "related person" provisions make companies affiliated with a "signatory operator" liable for the Coal Act obligations of that "signatory operator." 26 U.S.C. § 9706(b)(1)(A). On this basis, Berwind would be liable for any unpaid premiums Reitz owed with respect to Reitz's former employees, a liability Berwind has never contested. The purpose of the "related person" provisions is presumably to prevent a solvent company from escaping from the obligations of one of its sister companies which is itself insolvent, and which has miners to which it has health benefit obligations. But those provisions cannot be turned on their head to impose liability on a signatory operator for miners whom that operator itself employed 30 years previously solely because the operator is "related" to another signatory operator who never employed those miners.

They have done this by interpreting those provisions so as to impute to Berwind Reitz's signatory status as a signer of coal wage agreements through 1981, under which Reitz promised lifetime benefits to its own employees. *Berwind III*, at App. 27a-28a, 39a-40a. The Third Circuit and the SSA thereby have imposed liability upon Berwind for Berwind's own miners, whom Berwind last employed 30 years before the enactment of the Coal Act, an even longer retroactive imposition of liability than that in *Eastern Enterprises*, which this Court has held unconstitutional.

Based upon this remarkable statutory interpretation, which Berwind disputes, the Third Circuit concluded that, even though it was unconstitutional to assign miners to Eastern under section 9706(a)(3), as this Court held in *Eastern Enterprises*, it is somehow not unconstitutional, in light of the "related person" provisions, to assign to Berwind under section 9706(a)(3) miners Berwind had employed in the same era and without any promise of lifetime benefits. *Id.* at App. 27a-28a, 39a-40a. The Third Circuit conceded, in effect, that if the Coal Act had not pronounced in 1992 that Berwind and Reitz were "related persons" because Berwind continued to own the stock of Reitz (even though Reitz was no longer mining coal) on July 20, 1992, Berwind would be situated substantially identically to Eastern, and the Coal Act could therefore not constitutionally impose liability on Berwind for the miners it employed before 1963. *Id*, at App. 27a-28a. The "related person" provisions, however, cannot supply, remove, or otherwise manipulate facts that would mitigate or nullify the extreme severity, and constitutional infirmity, of imposing this retroactive liability on Berwind.

The opinions of Justice O'Connor and Justice Kennedy in *Eastern Enterprises* find constitutional relevance only in the unwarranted burden and severe retroactivity of the imposition of liability on Eastern, not the method by which the statute accomplished the unconstitutional result. The

logic of the opinions of Justice O'Connor and Justice Kennedy is that if, rather than being sold to a third party in 1987, EACC had stopped mining coal in 1984 but Eastern had continued to own the stock of a defunct EACC until July 20, 1992, the constitutional underpinnings of the *Eastern Enterprises* holding would have been the same as they were. Eastern presumably would have become liable for EACC's miners under the "related person" provisions (if EACC failed to meet its obligations) but there would have been no constitutional basis to render Eastern liable for its own miners, which it had employed prior to 1966. Eastern's having owned the EACC stock from 1984 until 1992 would not have reduced the constitutional infirmity caused by the extreme retroactivity of imposing liability on Eastern for miners last employed in 1966, the lack of connection between that liability and any of Eastern's contractual undertakings, and the huge amount of the potential liability. It would still have been unconstitutional to impose liability of $51,000,000 to $100,000,000 on Eastern for miners it had employed prior to 1966.

Justice O'Connor noted in *dictum* that "[a]lthough EACC continued mining coal until 1987 as a subsidiary of Eastern, Eastern's liability under the Act bears no relationship to its ownership of EACC; the Act assigns Eastern responsibility for benefits relating to miners that Eastern itself, not EACC, employed, while EACC would be assigned the responsibility for any miners that it had employed." *Eastern Enterprises*, 524 U.S. at 530. Here, too, the issue is Berwind's liability for its own miners, not those of Reitz, and that *dictum* cannot be converted into a constitutionally significant distinction.

Misunderstanding the constitutional analysis, however, the Third Circuit said that "Berwind . . . . glosses over the fact that *Eastern Enterprises* did not involve the Coal Act's related person provisions . . . ." *Berwind III*, at App. 28a.

But Berwind did not gloss over the fact that *Eastern Enteprises* did not involve the "related person" provisions. Berwind simply demonstrated that the statute cannot be used the way the SSA (and the Third Circuit) attempts to use it. Berwind argued, as it argues here, that a statute -- the "related person" provisions -- cannot change the result which this Court's opinion in *Eastern Enterprises* mandates. The holding in *Eastern Enterprises* is based upon facts -- severe retroactivity and unwarranted burden -- and no statutory provision pronouncing that Berwind and Reitz are related to each other can change those facts.

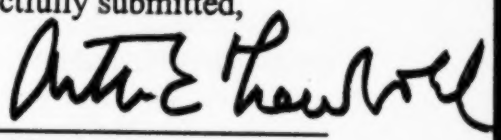
The Third Circuit did not seem to understand this issue and in any event did not discuss it. Instead, it interpreted the "related person" provisions as just another way of imposing liability on a coal company under section 9706(a)(3), the same liability this Court said Congress could not impose. Thus, the Third Circuit has permitted the "related person" provisions to accomplish what this Court would not allow Congress to do in *Eastern Enterprises*. The Third Circuit has thereby concluded that a statute can in effect overrule *Eastern Enterprises*, despite the long-settled principle, which this Court recently reaffirmed, that "Congress may not legislatively supersede our decisions interpreting and applying the Constitution." *Dickerson v. U.S.*, 530 U.S. 428, 437 (2000) (Rehnquist, J.) (*citing City of Boerne v. Flores*, 521 U.S. 507, 517-521 (1997) (Kennedy, J.); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is"). While Congress did not intend for the "related person" provisions to supersede a constitutional decision of this Court, the SSA has interpreted the provisions in such a way that they do, and the Third Circuit has mistakenly approved of it. The Third Circuit has thus ceded to the SSA this Court's power to interpret the Constitution. *See Miller v. Johnson*, 515 U.S. 900, 922

(1995) (Kennedy, J.) (this Court may not surrender to the Executive Branch the Court's role in enforcing constitutional limits); *see also Marbury*, 5 U.S. (1 Cranch) at 177.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX

PRECEDENTIAL

Filed October 2, 2002

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-3729/3798/3830.

BERWIND CORPORATION

v.

COMMISSIONER OF SOCIAL SECURITY; UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND; MICHAEL H. HOLLAND; WILLIAM P. HOBGOOD; MARTY D. HUDSON; THOMAS O.S. RAND; ELLIOT A. SEGAL; CARL E. VANHORN; GAIL R. WILENSKY, as Trustees of the United Mine Workers of America Combined Benefit Fund; THE UNITED MINE WORKERS OF AMERICA 1992 BENEFIT PLAN; A. FRANK DUNHAM, as Trustee of the United Mine Workers of America 1992 Benefit Plan; UNITED STATES OF AMERICA

United Mine Workers of America Combined Benefit Fund, Michael H. Holland, William P. Hobgood, Marty D. Hudson, Thomas O.S. Rand, Elliot A. Segal, Carl E. VanHorn, Gail R. Wilensky, The United Mine Workers of America 1992 Benefit Plan, A. Frank Dunham, United States of America,

Appellants No. 00-3729

BERWIND CORPORATION,

Appellant No. 00-3798

v.

COMMISSIONER OF SOCIAL SECURITY; UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND; MICHAEL H. HOLLAND; WILLIAM P. HOBGOOD; MARTY D. HUDSON; THOMAS O.S. RAND; ELLIOT A. SEGAL; CARL E. VANHORN; GAIL R. WILENSKY, as Trustees of the United Mine Workers of America Combined Benefit Fund; THE UNITED MINE WORKERS OF AMERICA 1992 BENEFIT PLAN; A. FRANK DUNHAM, as Trustee of the United Mine Workers of America 1992 Benefit Plan; UNITED STATES OF AMERICA

BERWIND CORPORATION

v.

COMMISSIONER OF SOCIAL SECURITY; UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND; MICHAEL H. HOLLAND; WILLIAM P. HOBGOOD; MARTY D. HUDSON; THOMAS O.S. RAND; ELLIOT A. SEGAL; CARL E. VANHORN; GAIL R. WILENSKY, as Trustees of the United Mine Workers of America Combined Benefit Fund; THE UNITED MINE WORKERS OF AMERICA 1992 BENEFIT PLAN; A. FRANK DUNHAM, as Trustee of the United Mine Workers of America 1992 Benefit Plan; UNITED STATES OF AMERICA

Commissioner of Social Security,

Appellant No. 00-3830

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(Civil Action No. 98-cv-05985)
District Judge: Hon. Jay C. Waldman

Argued: September 19, 2001

Before: SLOVITER, NYGAARD and McKEE,
Circuit Judges

(Opinion Filed: October 2, 2002)

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OPINION OF THE COURT

McKEE, *Circuit Judge.*

The basic question we must answer in these consolidated appeals is whether assignments the Commissioner of Social Security made pursuant to the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act"), 26 U.S.C. §§ 9701-9722 are unconstitutional pursuant to *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). The Commissioner assigned beneficiaries of the United Mine Workers of America Combined Fund to Berwind Corporation as provided in the Coal Act. Those beneficiaries were either miners who had been employed by Berwind prior to 1962 or they were dependents of miners who had been so employed. Berwind permanently ceased coal mining operations in 1962. Nevertheless, for the

reasons that follow, we hold that assignments are valid because the Act is not unconstitutional as applied to Berwind.

I. THE COAL ACT

This case involves yet another of the disputes arising from the historic enactment of the Coal Act and the economic and social forces that spawned it. The history of the Act has been recited in great detail in the Supreme Court's opinion in *Eastern Enterprises v. Apfel*, and to a lesser extent in our opinions in *Unity Real Estate v. Hudson*, 178 F.3d 649 (3d. Cir. 1999), and *Anker Energy Co. v. Consolidation Coal Co.*, 177 F.3d 161 (3d Cir. 1999).[1] Thus, we need not repeat that history here except insofar as it may be helpful to our discussion.

The Coal Act was enacted in 1992 "to resolve the imminent insolvency of multi- employer trusts created by coal industry agreements," *Coltec v. Hobgood*, 280 F.3d 262, 265 (3d Cir. 2002). Congress wanted "to ensure that retired coal miners and their dependents would continue to receive the health and death benefits they had been receiving since the 1940s pursuant to a series of collective bargaining agreements." *Anker Energy Corp. v. Consolidation Coal Co.*, 177 F.3d at 163-64.

In enacting the Coal Act, Congress intended to remedy problems with funding retiree health benefits in the coal industry by providing for sufficient operating assets for health benefit plans. Congress also intended to provide for the continuation of a privately funded and self-sufficient program that would deliver health care benefits to retired

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[1] *See also* our discussion in *Shenango Inc. v. Apfel*, No. 00- 2525, ___ F.3d ___ (3d Cir. 2002).

miners and their dependents. Pub.L. No. 102-486, § 19142(b), 106 Stat. 3036, 3037 (1992), 26 U.S.C. § 9701 note. Congress created two new statutory trust funds to achieve these ends; the Combined Fund and the 1992 Plan.[2]

The Coal Act required that certain benefit plans previously established under collective bargaining agreements with the United Mine Workers of America ("UMWA") be merged into a new plan -- the United Mine Workers of America Combined Benefit Fund. 26 U.S.C. § 9702(a). This "Combined Fund" provides health and death benefits to retired coal miners and dependents who were eligible to receive benefits from the UMWA 1950 or 1974 benefit plans as of July 20, 1992. 26 U.S.C. §§ 9703(a), (b)(1), (c), (e) & (f). The 1992 Plan was an entirely new entity designed to provide benefits to those eligible retirees and their dependents who are not beneficiaries of the Combined Fund and who are not receiving health care coverage directly from their former employees. 26 U.S.C. § 9712. Benefits paid through the Combined Fund are funded in part by premiums imposed on "signatory coal operators," i.e., coal operators that employed an eligible beneficiary and that also signed a collective bargaining agreement between the UMWA and Bituminous Coal Operators' Association ("BCOA").[3] The Act also required that other "related persons" connected to the signatory operator by common ownership or control pay such premiums. *See* 26 U.S.C. §§ 9701(c)(1) & (c)(2), 9704, 9706.

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[2] The Combined Fund and the 1992 Plan are two of three components formulated by Congress to achieve the purposes of the Coal Act. The second component is the mandated continuation of individual employer health plans maintained by signatories to the 1978 and later NBCWAs. 26 U.S.C. § 9711. It is not implicated in these appeals.

[3] The BCOA is a multiemployer group of coal producers.

The Coal Act directs the Commissioner of Social Security[4] to assign each individual beneficiary to one of these signatory coal operators or its "related person" in accordance with specified criteria. These criteria establish a system of priorities based upon the length of the beneficiary's service, the date of his service, and whether his employer participated in national collective bargaining agreements with the UMWA that were signed in 1978 or subsequent years.[5] 26 U.S.C. § 9706(a). The system of assigning beneficiaries by the Commissioner involves three steps or tiers that we have described as the "linchpin" of the Coal Act's statutory scheme. *Unity Real Estate Co. v. Hudson*, 178 F.3d at 654. The Coal Act provides:

> (a) In general.--For purposes of this chapter, the Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business in the following order:
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> (1) First, to the signatory operator which--

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[4] Originally, the Coal Act provided that the Secretary of Health and Human Services would be responsible for the assignment of Combined Fund beneficiaries. The Secretary delegated this task to the Commissioner of Social Security. In 1994, Congress transferred the statutory responsibility directly to the Commissioner. *See* Social Security Independence and Program Improvements Act of 1994, Pub.L.No. 10-3-296, §§ 105(a)(2)(A), 108(h)(9)(A), 108 Stat. 1472, 1487-88 (1994).

[5] Inasmuch as it is a fair generalization to assume that practically all miners during the relevant period were male, we will use the masculine pronoun throughout.

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.

(2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which--

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.

(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

26 U.S.C. § 9706(a)(1), (2) & (3). Once the Commissioner makes an assignment under § 9706, the assignee must then pay annual premiums to the Combined Fund based on the amounts needed to provide health and death benefits for the assigned beneficiaries.

If a miner or his dependents cannot be assigned to an extant company under this scheme, benefits are funded by either asset transfers from one of the Combined Fund's predecessor benefit plans, *see* 26 U.S.C. § 9705(a), transfers from the U.S. Treasury's Abandoned Mine Land

Reclamation Fund, *see* 26 U.S.C. § 9705(b), 30 U.S.C. § 1232(h), or, if those sources are insufficient or unavailable, an additional unassigned -- or "orphaned" -- retiree premium is imposed on all signatory operators. *See* 26 U.S.C. §§ 9704(d), 9705(a)(3)(B), 9705(b)(2).

The Combined Fund's assignment structure also includes a set of statutory provisions governing the imposition of Coal Act liability on business entities that are deemed "related persons" with respect to miners' original employers. The Coal Act sets forth several provisions that, taken together, treat a commonly controlled group of related corporations as a single employer. This "grouping" is an integral part of the Coal Act. It allows responsibility for miners' benefits to be assigned both to the original employer and to a wide range of affiliated companies or successors. Premium assignments may be made either to a "signatory operator" that employed the miner or to any "related person." 26 U.S.C. § 9706(a). A "related person" is defined to include all members of a commonly controlled group of corporations that includes the signatory, other businesses under common control with the signatory, and subsequent successors in interest to any of these affiliated entities. 26 U.S.C. § 9701(c)(2)(A). A "controlled group" of corporations is in turn defined as a group of companies in which a common parent or concentration of individual economic interests owns or controls more than 50% of the stock in each of the affiliated companies. *See* 26 U.S.C. § 9701(c)(2)(A), incorporating by reference 26 U.S.C. § 52(a) & (b), which in turn incorporates by reference 26 U.S.C. § 1563(a). The determination of which entities are "related persons" for purposes of the Coal Act turns on the companies' structure and/or ownership as of a "look back" date of July 20, 1992. 26 U.S.C. § 9701(c)(2)(B).

These "related persons" have a broad, shared responsibility for statutory premiums. The Coal Act

expressly provides that any company within the commonly controlled group may be treated as having employed a related signatory's miners. 26 U.S.C. § 9706(b). In addition, related persons may be held "jointly and severally liable for any premium required to be paid" by its affiliated signatory operator. 26 U.S.C. § 9704(a). Congress instructed the Commissioner to complete initial assignment of miners promptly after the Coat Act's 1992 enactment. The statute thus states: "For purposes of this chapter, the Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator...." 26 U.S.C. § 9706(a).[6] With regard to the 1992 Plan, the Coal Act also requires the last signatory operator to which each 1992 Plan beneficiary is attributable to pay a monthly premium for each attributable beneficiary to cover the cost of that beneficiary's health care. *See* 26 U.S.C. § 9712(d)(1)(b), (3). The Commissioner of Social Security therefore plays no role in assigning 1992 Plan beneficiaries. Rather, the last signatory operator of each such beneficiary is automatically responsible for the respective beneficiary's health care. If the last signatory operator under the 1992 Plan is no longer in business, its premiums are provided by additional premiums imposed on a proportional basis on signatories to the 1988 National Bituminous Coal Wage Agreement ("NBCWA"). 26 U.S.C. §§ 9701(c)(3); 9712(d)(1)(A), (6).

II. BERWIND CORPORATION'S HISTORY AND ITS INVOLVEMENT IN THE COAL INDUSTRY

Berwind Corporation was originally incorporated in 1915 as "The Berwind-White Coal Mining Company".

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[6] We have, however, held that the Commissioner did not lose authority to make such assignments after October 1, 1993. *See Shenango Inc. v. Apfel*, No. 00-2525, ___ F.3d ___ (3d Cir.2002).

Berwind-White signed the 1950 NBCWA and the 1951, 1952, 1955, 1956 and 1958 amendments thereto. The company mined coal until 1962, when it permanently ceased coal mining operations. It never employed any UMWA-represented coal miners in any capacity after it closed its last mine in 1962.

However, in 1963, Berwind-White became the 98% shareholder of Reitz Coal Company. It later acquired the remaining 2% of the outstanding shares thus making Reitz Coal Company its wholly owned subsidiary. Reitz Coal Company was a signatory to the 1950 NBCWA when Berwind-White acquired it.[7]

In 1967, Berwind-White changed its name to "Berwind Corporation." In 1978, Berwind formed a partnership with Scallop Coal Corp., affiliate of Royal Dutch Shell Petroleum Corp., in which each partner had a 50% interest. The partnership, known as "Reitz Coal Associates", was formed for the purpose of marketing coal produced by Reitz Coal Company, which was still a subsidiary of Berwind.

In 1983, Reitz Coal Associates changed its name to "Devon Coal Associates." That same year, Reitz Coal Company leased its coal mining assets and coal reserves to the Midlothian Company, which in turn subleased them to Devon Coal Associates. Devon Coal Associates operated the mines owned by Reitz Coal Company and assumed Reitz Coal Company's obligations under the 1981 NBCWA.

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[7] The New River and Pocahontas Consolidated Coal Company ("New River") operated mines in West Virginia and employed UMWA-represented miners until 1961. New River merged into Berwind-White in September, 1964. New River was a signatory to the 1959 NBCWA, and the 1951, 1952, and 1955 amendments thereto.

In July 1983, Berwind transferred its 50% interest in the Devon Coal Associates partnership to Old Devon, Incorporated; a wholly-owned subsidiary of Berwind. Reitz Coal Company also changed its name to "Reitz Corporation" and the Devon Coal Associates partnership changed its name to "Reitz Coal Company."

In May 1992, Old Devon, Inc., purchased the remaining 50% interest in the partnership now known as Reitz Coal Company. As a result, the partnership ceased to exist by operation of law and all of the partnership's assets and liabilities vested in Old Devon, Inc.

On June 19, 1992, Old Devon, Inc., changed its name to "Reitz Coal Co." This new Reitz Coal Co. remained a wholly-owned subsidiary of Berwind. On December 31, 1993, the original Reitz, i.e., "Reitz Corp.", was dissolved.

Although the constant name changes and shifting corporate structures create a rather ephemeral corporate lineage, one fact remains essential for our analysis: from 1963 until today, Berwind has owned at least 98% of the entity originally known as "Reitz Coal Co."; an entity which signed the 1974, 1978 and 1981 NBCWAs. In September of 1984, the UMWA declared a strike against the entity originally known as Reitz Coal Co. It was unable to reach an agreement with the UMWA on a successor contract to the 1981 NBCWA and its mines never reopened. It never mined coal after 1984, either with or without UMWA miners, and it never again employed UMWA members in any other capacity. Today, Berwind is a closely-held, family corporation which has investments in a wide variety of businesses, a number of which are unrelated to mining coal. However, Berwind remains in the coal industry as some of its subsidiaries lease land to coal mining companies and others purchase coal and prepare it for resale. Thus, Berwind is "in business" for purposes of the Coal Act. 26

U.S.C. § 9701(c)(7). In addition, Berwind admits that it still owns the now defunct Reitz Corp. and that Berwind and Reitz are "related persons" as defined in the Coal Act. 26 U.S.C. § 9701(c)(2).

III. THE COMMISSIONER'S COAL ACT ASSIGNMENTS

In accordance with § 9706(a) of the Coal Act, 1,923 Combined Fund Beneficiaries who were previously employed by, or were dependents of people previously employed by, Berwind (and certain companies that merged into Berwind in the 1960s) were assigned to Berwind by the Commissioner as of February 1, 1993. As of October 1, 1998, the number of Combined Fund beneficiaries assigned to Berwind had dropped to 1,209, primarily due to the high mortality rate of the Combined Fund's elderly beneficiary population. Berwind's monthly liability for the Plan Year 1998 -- the most recent in the record -- was $295,793.93. Berwind unilaterally ceased making payments in or around July 1998, and, as of May 25, 1999, its Combined Fund liability was $3,220,473.81. Berwind was also assigned premium liability for five Combined Fund beneficiaries who had worked for Reitz.

Under § 9712 of the Coal Act, 26 U.S.C. § 9712, one 1992 Plan beneficiary was attributable to Berwind from the outset, and two additional 1992 Plan beneficiaries, who began receiving benefits in March of 1995, were also attributable to Berwind.[8] As of December 1998, the number of 1992 Plan beneficiaries directly attributable to Berwind had dropped to two. Berwind's monthly premium was then $566.50. Berwind unilaterally ceased making payments to

[8] As we have noted, the Commissioner plays no part in the assignment of 1992 Plan Beneficiaries.

the 1992 Plan in or around July 1998 and, as of May 25, 1999, Berwind owed the 1992 Plan $6,299.62.[9]

IV. BERWIND'S RESPONSE TO THE COMBINED FUNDS BENEFICIARIES' ASSIGNMENTS

On September 2, 1993, after the Commissioner made Coal Act assignments to Berwind, Berwind and three co-plaintiffs sued the Secretary of Health and Human Services[10] and the Combined Fund in the United States District Court for the Southern District of Indiana. Plaintiffs claimed that the Commissioner's Coal Act assignments violated the Takings and Due Process Clauses of the Fifth Amendment. The district court granted summary judgment in favor of the defendants and against Berwind. That ruling was affirmed on appeal, and the Supreme Court denied *certiorari*. *Templeton Coal Co. v. Shalala*, 882 F.Supp. 799 (S.D.Ind. 1995), *aff'd sub nom., Davon, Inc. v. Shalala*, 75 F.3d 1114 (7th Cir.), *cert. denied*, 519 U.S. 808 (1996)("*Berwind I*"). Twenty-two months after *certioriari* was denied in *Berwind I*, the Supreme Court decided *Eastern Enterprises v. Apfel*.

V. *EASTERN ENTERPRISES* AND THE COMMISSIONER'S RESPONSE

In *Eastern Enterprises*, the Court considered the constitutionality of the Coal Act as applied to Eastern

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[9] Berwind claims that since the inception of its liability under the Coal Act, it has paid $16,779,414 in premiums to the Combined Fund and $36,386 in premiums to the 1992 Plan. In June 1998, Berwind calculated the pre-tax, net present value of its total future liability under the Coal Act to be approximately $24.5 million. Actuarial projections show that Berwind will be liable for Coal Act premiums until approximately the year 2040. Amended Complaint, at ¶¶ 14, 15, 18 (App. at 124).

[10] *See* n.4 *supra*.

Enterprises, a company that had been involved in coal mining until 1965, and had signed every NBCWA from 1947 until 1964. Pursuant to 26 U.S.C. § 9706(a)(3), the Commissioner assigned Coal Act liability to Eastern for over 1000 miners, based on Eastern's status as the pre-1978 signatory operator for whom the miners had worked for the longest period of time. Its total liability was estimated to be between $50 and $100 million. Eastern claimed that § 9706(a)(3) was unconstitutional as applied to it because the enactment violated both the Due Process and Takings Clauses of the Fifth Amendment.

Although a majority of the justices agreed § 9706(a)(3) was unconstitutional as applied to Eastern Enterprises, they could not agree on a rationale. A four-justice plurality concluded that the Act violated the Fifth Amendment as applied to Eastern as it was an unconstitutional taking. *Eastern Enterprises*, 524 U.S. at 537. The plurality recognized that a Takings analysis is "essentially an ad hoc and fact intensive" inquiry. Nonetheless, the justices were able to identify three factors that were generally of particular significance: "the economic impact of the regulation, its interference with investment backed expectations, and the character of the governmental action." *Id.* at 523-524 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)). The plurality then reviewed its Takings Clause analysis in cases involving legislative schemes similar to the Coal Act. This included suits under the Black Lung Benefits Act, and the Multiemployer Pension Plan Amendments Act ("MPPAA") which was enacted to supplement the Employee Retirement Income Security Act ("ERISA"). The Court concluded:

> Congress has considerable leeway to fashion economic legislation, including the power to affect contractual commitments between private parties. Congress may also impose

> retroactive liability to some degree, particularly where it is confined to short and limited periods required by the practicalities of producing national legislation. *Our decisions, however, have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience.*

Id. at 528-529 (citation and internal quotations omitted) (emphasis added).

The plurality, applied this Takings Clause jurisprudence to Eastern Enterprises by first focusing on the economic impact of the Coal Act, and concluded that the Act placed a "considerable financial burden" on Eastern Enterprises. *Id.* at 529. Although the plurality conceded that this financial burden was not a "permanent physical occupation of Eastern's property of the kind [usually] viewed as a per se taking," it reasoned that decisions upholding the MPPAA "suggest that an employer's statutory liability for multiemployer pension plans should reflect some proportionality to its experience with the plan." *Id.* at 530 (citation and internal quotations omitted). The assignments to Eastern lacked such proportionality. Although Eastern did contribute to the 1947 and 1950 W & R Funds, "it ceased its coal mining operations in 1965 and neither participated in negotiations nor agreed to make contributions in connection with the 1974, 1978, or subsequent NBCWAs." *Id.* The absence of any nexus to the 1974 and later NBCWAs was significant because those agreements were the "first [to] suggest an industry commitment to funding lifetime health benefits for both retirees and their family members." *Id.*

Thus, because Eastern Enterprises had neither contemplated liability for the provision of lifetime benefits to miners nor contributed to the miners' expectations of such benefits, the plurality concluded that, even though Eastern had employed the assigned miners at some point, "the correlation between Eastern and its liability to the Combined Fund is tenuous, and the amount assessed against Eastern resembles a calculation made in a vacuum." *Id.* at 531 (citation and internal quotations omitted).

The plurality also concluded that proportionality was lacking with regard to the two other Takings Clause factors. The Coal Act's "substantial and particularly far reaching" retroactivity[11] interfered with Eastern's reasonable investment backed expectations. *Id.* at 534. The plurality reasoned that because a coal industry employer could not have contemplated liability for lifetime benefits to miners until the 1974 NBCWA, "the Coal Act's scheme for allocation of Combined Fund premiums is not calibrated either to Eastern's past actions or to any agreement--implicit or otherwise--by the company." *Id.* at 536. Finally, the plurality concluded that the "nature of governmental action ... is quite unusual," and "implicates fundamental principles of fairness underlying the Takings Clause," because it "singles out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers' made or to any injury they caused." *Id.* at 537.

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[11] Coal Act assignments operate retroactively because they require an assignee to use current funds to provide benefits for miners after the assignee believed its liability to the miners had been settled. *See Eastern Enterprises*, at 534 (O'Connor, J.) ("[T]he Coal Act operates retroactively, divesting Eastern of property long after the company believed its liabilities under the 1950 W & R Fund to have been settled.").

Therefore, because each of the significant factors in a Takings analysis was implicated, the plurality found that the Act was an unconstitutional taking as applied to Eastern Enterprises.

Justice Kennedy, provided the fifth vote striking down the Act as unconstitutional as applied, but he disagreed with the plurality's Takings Clause analysis. Rather, he concluded that the Act's retroactivity violated due process. *Id.* at 539-50. He applied an "arbitrary and irrational" standard of review, *id.* at 547, and focused on the fact that Eastern Enterprises had not signed a 1974 or later NBCWA. He reasoned:

> Eastern was once in the coal business and employed many of the beneficiaries, but it was not responsible for their expectation of lifetime benefits or for the perilous condition of the 1950 and 1974 plans which put the benefits in jeopardy. As the plurality discusses in detail, the expectation was created by promises and agreements made long after Eastern left the coal business. Eastern was not responsible for the resulting chaos in the funding mechanism caused by other coal companies leaving the framework of the National Bituminous Coal Wage Agreement. *This case is far outside the bounds of retroactivity permissible under our law.*

Id. at 550 (emphasis added).

The four dissenting justices agreed with Justice Kennedy that the application of the Act did not violate the Takings Clause, but disagreed with his view that the Act violated the Due Process Clause. *Id.* at 556-67.

In subsequent cases discussing the decision in Eastern Enterprises, we have noted that the "splintered nature" of the Court's decision made "it difficult to distill a guiding principle from Eastern." *Unity Real Estate Co.*, 178 F.3d at 658. However, as recited above, both the plurality and Justice Kennedy focused on one significant fact. The 1974, 1978 and subsequent NBCWAs were the first wage agreements that included a commitment to funding lifetime health benefits for retired miners and their dependents. No such commitment was contained in any earlier wage agreement. Because Eastern Enterprises was not a signatory to either the 1974 or the 1978 NBCWAs, it could not have contemplated that it would be responsible for contributing to the miners' expectation of lifetime health benefits. *See Anker Energy Corp. v. Consolidation Coal Co.*, 177 F.3d at 172 ("[A]nalysis of the decisions in Eastern Enterprises leads us to the conclusion that a majority of the Court would find the Act unconstitutional when applied to an employer that did not agree to the 1974 or subsequent NBCWAs, while application of the Act to a signatory to the 1974 or subsequent wage agreement would be an entirely different matter."); *see also, Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1257 (D.C.Cir.1998)("The clear implication of each opinion in Eastern Enterprises is that employer participation in the 1974 and 1978 agreements represents a sufficient amount of past conduct to justify the retroactive imposition of Coal Act liability (for the dissenting justices, of course, such participation is not even necessary.")

On September 24, 1998, the Commissioner voided the Coal Act beneficiary assignments of 113 companies that he concluded were similarly situated to Eastern Enterprises. He also decided that no beneficiaries would be assigned to another 11 similarly situated companies that had not yet received assignments. The group whose assignments were

voided by the Commissioner included Berwind's three co-plaintiffs in *Berwind I*.[12] Berwind also ceased making premium payments (after June 1998) and requested that the Commissioner void Berwind's assignment as well. The Commissioner refused, and this lawsuit followed.

VI. DISTRICT COURT PROCEEDINGS

On November 12, 1998, Berwind filed suit in the United States District Court for the Eastern District of Pennsylvania seeking a declaration that the Coal Act violates the Takings and Due Process Clauses of the Fifth Amendment. Berwind named the Commissioner of Social Security and the Combined Fund and its Trustees as defendants. On February 3, 1999, Berwind amended its complaint by naming the 1992 Plan and its Trustees as additional defendants.

In Counts I and II of its eight count complaint, Berwind alleged that the Coal Act violates the Due Process Clause and the Takings Clause as the Act applies to Berwind. In Count III, Berwind alleged that the entire Coal Act is unconstitutional. In Count IV, Berwind asserted a statutory claim for a refund of premiums paid since April 1995. Berwind argued that such a refund was required under Section 9706(f)(3) of the Act, 26 U.S.C. § 9706(f)(3). In Count V, Berwind sought relief against the Commissioner of Social Security, claiming that the Commissioner violated the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), by refusing to void the assignment of Combined Fund beneficiaries to Berwind after Eastern Enterprises. In Counts VI, VII and VIII, Berwind alleged alternative claims for the refund of premiums that it had paid to the Combined Fund

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[12] The Court decided *Eastern* on June 24, 1998, twenty-two months after it denied *certiorari* in *Berwind I*.

and the 1992 Plan since April 1995. Specifically, in Count VI, Berwind alleged a common law claim for restitution; in Count VII, a claim for a refund under the Employee Retirement Income Security Act ("ERISA"), as amended, 29 U.S.C. § 1001 *et seq.*; and, in Count VIII, a claim against the United States for a tax refund.

The Combined Fund, the 1992 Plan, and their respective Trustees (collectively the "Trustees") answered and filed counterclaims seeking a declaration that the Coal Act does not violate either the Takings or the Due Process Clauses as applied to Berwind. They also sought to recover the assessed health care premiums that Berwind unilaterally stopped paying after the Court's Eastern Enterprises decision.

In time, all parties moved for summary judgment and the district court ruled on those motions in two separate opinions and orders. *Berwind Corp. v. Apfel*, 94 F.Supp.2d 597 (E. D. Pa. 2000) and *Berwind Corp. v. Apfel*, 2000 WL 1337112 (E. D. Pa. Sept. 15, 2000). The district court held that Berwind had fully litigated its constitutional claims in *Templeton Coal Co. v. Shalala*, *supra* and that the adverse judgment in that case was *res judicata*. Accordingly, the district court dismissed Counts I, II and III. However, the district court found that Berwind could proceed with its APA challenge to the Commissioner's decision not to void Berwind's Combined Fund beneficiary assignments after Eastern Enterprises. The court also ruled that the Commissioner had acted arbitrarily and capriciously in deciding not to void those assignments. Therefore, the district court granted summary judgment to Berwind on its APA claim in Count V and on its claim for restitution in Count VI. It awarded Berwind more than $14 million from the Combined Fund and more than $35,000 from the 1992

Plan,[13] and dismissed Berwind's remaining claims. The court rejected Berwind's claims under the Coal Act itself and under ERISA (as referenced in the Coal Act) because neither statute provides for a cause of action to recover alleged overpayments. Finally, the district court dismissed Berwind's claim for a tax refund because that claim was only made in the alternative and it was therefore superfluous because the court had ordered restitution from the Funds.

The district court also dismissed the Trustees' counterclaims, except that it found that Berwind was a "related person" to Reitz and that Berwind was therefore obligated to pay Coal Act premiums for those assigned beneficiaries who were retirees of Reitz. These appeals followed.

VII. DISCUSSION

At first glance, these consolidated appeals appear to raise several interwoven, yet distinct issues. However, upon close examination, all of the issues -- Berwind's as applied constitutional challenges,[14] its APA claim and its premium

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[13] The district court, believing that the "1992 Plan assignments . . . are made in precisely the manner as Combined Fund assignments. . . . ," 94 F.Supp.2d at 608 n.10, regarded the APA claim as dispositive of the 1992 Plan. However, as noted earlier, the Coal Act allocates financial responsibility for the 1992 Plan in a manner completely different from the Combined Fund. The Commissioner plays no part in assigning beneficiaries to the 1992 Plan. In fact, beneficiaries are not even "assigned" to the 1992 Plan. Rather, the last signatory operator of each 1992 Plan beneficiary is automatically responsible for the beneficiary's health care premium. 26 U.S.C. § 9712(d)(1)(b), (3). Moreover, Berwind never asked for any relief against the 1992 Plan.

[14] Berwind does not contest the district court's dismissal of its claim that the entire Coal Act is unconstitutional. The Commissioner and the Trustees claim that as a result of *Templeton Coal Co. v. Shalala*, Berwind's as applied constitutional challenge is barred by the doctrine of

refund claims -- turn on whether Berwind is in a substantially identical position to the plaintiff in Eastern Enterprises.[15]

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res judicata. The Trustees also claim that Berwind's common law restitution claim for premiums paid is similarly barred by res judicata because it is premised on the as applied unconstitutionality of the Coal Act. Berwind responds by arguing that its as applied challenge and its restitution claim are not barred by *res judicata* because they are based on causes of action that arose after the district court in *Berwind I* dismissed its constitutional challenge to the assignments. In Berwind's view, each new assessment of premium liability subsequent to the district court's decision in *Berwind I* constitutes a new cause of action.

We do not believe that we are required to resolve this issue. "[R]es judicata is an affirmative defense and not a doctrine that would defeat subject matter jurisdiction of this court." *Rycoline Products, Inc. v. C & W Unlimited*, 109 F.3d 883, 886 (3d Cir.1997) (*quoting Livera v. First Nat'l Bank of New Jersey*, 879 F.2d 1186, 1190 (3d Cir.1989)). Therefore, we can proceed to the merits of the as applied constitutional challenge and the common law restitution claim without violating the Supreme Court's prohibition against assuming "hypothetical jurisdiction" to reach the merits of a claim. *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998).

The Commissioner does not claim that Berwind's APA claim is barred by *res judicata*. Yet, as explained below, *see* n. 15, infra, determining whether the Commissioner violated the APA requires the same inquiry that we would have to undertake to determine if the Coal Act is unconstitutional as applied to Berwind.

[15] Procedurally, these appeals are here as a result of the district court's grant of summary judgment. Thus, our standard of review would be plenary. *Fertilizer Institute v. Browner*, 163 F.3d 774, 777 (3d Cir. 1998). However, we review the Commissioner's action as final agency action under the APA to determine if the administrative decision was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *Anker Energy Corp. v. Consolidation Coal Co.*, 177 F.3d at 169 (quoting 5 U.S.C. § 706(A)(2)). The district court's decision to grant equitable restitution to Berwind is subject to an abuse of discretion standard of review, so long as we agree with the district court's legal conclusions. *See Bechtel v. Robinson*, 886 F.2d 644, 647 (3d Cir.

As we noted earlier, the Court's judgment in *Eastern Enterprises* was not based on any single rationale. Where that happens, " 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.' " *Marks v. United States*, 430 U.S. 188, 193 (1977)(quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). However, the *Marks* rule only applies where "one opinion can be meaningfully regarded as 'narrower' than another" and can "represent a common denominator of the Court's reasoning." *Rappa v. New Castle County*, 18 F.3d 1043, 1057 (3d Cir. 1994) (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C.Cir. 1991)) (en banc). Therefore, "in cases where approaches differ, no particular standard is binding on an inferior court because none has received the support of a majority of the Supreme Court." *Anker Energy Corp.*, 177 F.3d at 170 (citing *Rappa v. New Castle County*, 18 F.3d at 1058).

In *Unity Real Estate*, we acknowledged that "Justice Kennedy's substantive due process reasoning in *Eastern Enterprises* is not a 'narrower' ground that we might take to constitute the controlling holding." 178 F.3d at 658. Consequently, the only binding aspect of the fragmented decision in Eastern Enterprises is its "specific result," i.e., the Act is unconstitutional as applied to Eastern Enterprises. *Anker Energy Corp.*, 177 F.3d at 170 (citing *Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1255

1989). However, because the district court granted equitable restitution to Berwind after it found that the Commissioner violated the APA by not voiding Berwind's Combined Fund beneficiary assignments in light of *Eastern Enterprises*, we must also determine if Berwind is in a substantially identical position to the plaintiff in *Eastern Enterprises*. That inquiry is the same inquiry that would be undertaken in determining the constitutionality of the Coal as applied to Berwind. Thus, our standard of review is de novo. *Anker Energy Co. v. Consolidation Coal Co.*, 177 F.3d at 169.

(D.C.Cir. 1998)). Given our analysis in *Unity Real Estate*, "*Eastern* . . . mandates judgment for the plaintiffs only if they stand in a substantially identical position to Eastern Enterprises with respect to both the plurality and Justice Kennedy's concurrence."[16] 178 F.3d at 659.

Berwind concedes that it and Reitz are "related persons" as defined by the Coal Act, and therefore its obligation for the premium liability for the five Combined Fund beneficiaries formerly employed by Reitz is constitutional. However, Berwind submits that the assignments of the Combined Fund beneficiaries formerly employed by it are unconstitutional as applied because of Berwind's substantial identity to Eastern Enterprises. Berwind claims this substantial identity because, like Eastern Enterprises, it stopped its coal mining operations in the early 1960s; and, like Eastern Enterprises, it never signed a 1974 or later NBCWA. Therefore, argues Berwind, it never created or reinforced an expectation of lifetime health benefits in its assigned Combined Fund beneficiaries or their dependents. Indeed, Berwind argues that its circumstances are "better than" Eastern's, because Berwind stopped coal mining three years earlier than Eastern Enterprises did and its total Coal Act liability "is equal to or even larger than Eastern's was -- as much as $138 million cumulatively, compared to between $51 million and $100 million for Eastern." Berwind's Brief as Appellee, at 23.

Berwind makes no other constitutional challenge to the Combined Fund assignments. It does not challenge the constitutionality of the Act's "related person" provisions and

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[16] We also held in *Unity Real Estate* that because of the concurrence and dissent in Eastern Enterprises, "we are bound to follow the five-four vote against the takings claim. . . ." 178 F.3d at 659; *see also Anker Energy Corp.*, at 170 n.3. Therefore, Berwind's challenge is on substantive due process grounds.

it does not challenge the constitutionality of the "controlled group" provisions. Therefore, as we said earlier, Berwind's as applied constitutional challenge, its APA claim and its restitution claim rise or fall on whether it is in a substantially identical position to Eastern Enterprises. For the reasoning that follows, we conclude that Berwind's position is materially different from Eastern Enterprises' and that the difference requires a different outcome.

Eastern Enterprises began operations in 1929 and mined coal in West Virginia and Pennsylvania until 1965. *Eastern*, 524 U.S. at 516. It was a signatory to each NBCWA executed between 1947 and 1964 and made contributions to the 1947 and 1950 welfare and retirement funds of over $60 million. *Id.* In 1963, Eastern decided to spin-off its coal operations to a subsidiary, Eastern Associated Coal Corp. ("EACC"). *Id.* The spin-off was completed by 1965, but Eastern retained its stock interest in EACC through a subsidiary corporation, Coal Properties Corp. ("CPC") until 1987, and it received dividends of more than $100 million from EACC during that period. *Id.*

After 1965, Eastern ceased coal mining operations and was therefore not a signatory to the 1974 NBCWA or any subsequent wage agreements. As we have noted, the 1974 wage agreement was the first one to require an industry-wide commitment to funding lifetime health benefits of miners and their dependents. *Id.* at 530. However, EACC did sign the 1974 and later NBCWAs even though Eastern Enterprises didn't. In 1987, Eastern sold its interest in CPC to Peabody Holding Co., Inc. *Id.* at 516. As a consequence of that sale to an unrelated third party, Eastern had divested itself of all of its interests in its EACC subsidiary five years before the enactment of the Coal Act.

After the enactment of the Coal Act, the Commissioner assigned Eastern the obligation for Combined Fund

beneficiary premiums for over 1,000 retired miners who had worked for Eastern before 1966 pursuant to § 9706(a)(3). The assignments were based on Eastern's status as the pre-1978 signatory operator for whom the miners had worked the longest. *Id.* at 517. No miners who had been employed by EACC were assigned. *Id.* at 530. Sometime after the Commissioner made the assignments, Eastern filed the aforementioned suit attacking the Act as unconstitutional as applied under the Takings and Due Process Clauses.

When we compare Eastern's circumstances with Berwind's, it is obvious that Berwind is not in a "substantially identical position to Eastern." Eastern's premium liability under the Coal Act was based solely on its having employed the miners assigned to it -- miners in whom Eastern could not have created a reasonable expectation of lifetime health benefits because it never signed the 1974 NBCWA or subsequent NBCWAs. *See id.* at 531 ("The company's obligations under the Act depends solely on its roster of employees some 30 to 50 years before the statute's enactment, without any regard to responsibilities that Eastern accepted under any benefit plan the company itself adopted."). Eastern never addressed the question of premium liability under the Coal Act's "related person" provision, the basis of Berwind's liability here.

Berwind reminds us that Eastern Enterprises had a subsidiary, EACC, that signed a post-1974 NBCWA, and argues that Eastern Enterprises' relationship with EACC was not sufficient to sustain the constitutionality of the Commissioner's assignments of Combined Fund beneficiaries. However, this similarity does not put Berwind into Eastern's shoes because of one obvious and crucial distinction that Berwind glosses over. Eastern divested itself of EACC in 1987, five years before the enactment of the Coal Act and the "look back date" of July 20, 1992. As noted, the Coal Act provides that where ostensibly related

companies remain in business, the question of whether they are "related persons" is determined with respect to their relationship as of July 20, 1992, a date shortly before the Act's passage. 26 U.S.C. § 9701(c)(2)(B). Because Eastern had sold EACC in 1987, EACC was not considered a "related person" to Eastern under the Act as of July 20, 1992. Therefore, premium liability could not have been imposed on Eastern based on any relationship it had to EACC. This distinction is fatal to Berwind's argument here.

Berwind not only glosses over the fact that *Eastern Enterprises* did not involve the Coal Act's related person provisions, it also glosses over the fact that we have twice held that premium liability under the Act's related person provisions removes an assignee from the holding of *Eastern Enterprises*, and defeats the required similarity to the position of that plaintiff. More precisely, we have twice held that related persons to coal companies that signed the 1974 NBCWA and later NBCWAs are not in a substantially identical position to Eastern Enterprises. Today, it is necessary to reiterate that principle yet again.

In *Unity Real Estate*, we upheld the constitutionality of the Coal Act as applied to a company that was a related person to both a pre-1974 NBCWA signatory and a post-1974 signatory. When the Commissioner made the premium assignments at issue there, Unity Real Estate Company was a small corporation closely held by members of the Jamison family. Unity owned a small commercial building and a parking lot. It never mined coal and never signed a coal wage agreement. Nonetheless, under the Coal Act, it was a related person to several, defunct coal mining companies formed by members of the Jamison family that ultimately merged into Unity. Among those companies were South Union-PA and South Union-WVA. South Union-PA had mined coal since 1923 and had signed the 1947 NBCWA and amendments thereto through 1961. South Union-WVA

began mining when South Union-PA stopped and it had signed the 1974, 1978 and 1981 NBCWAs.[17]

The Commissioner assigned Combined Fund premium liability to Unity for the miners formerly employed by all of Unity's related person entities pursuant to §§ 9706(a)(1) & (2), and Unity challenged the assignments under *Eastern*. After a comprehensive analysis of the various opinions in *Eastern*, we upheld the constitutionality of the Coal Act as applied to Unity and all of the disputed assignments, including assignments of miners who had worked for South Union-PA, even though South Union-PA had never signed a 1974 or later NBCWA. The critical distinction was that Eastern Enterprises never signed the 1974 or later NBCWAs and it was not a related person to any entity that had. In contrast, South Union-WVA, its related person, had "signed". We noted that

> [b]ecause the plaintiffs signed NBCWAs in 1974 and thereafter, they are factually distinguishable from *Eastern Enterprises*. Language in the plurality and the concurrence suggesting that expectations fundamentally changed after 1974 support our conclusions.

178 F.3d at 659. Just as that distinction was crucial in *Unity Real Estate*, the same distinction between Eastern and Berwind "compels the conclusion that *Eastern* is not on all fours with the case before us." *Id.*

In *Anker Energy*, we also upheld that Act's application to a related person with a nexus to a post-1974 signatory operator. We held that the fact that Anker's related person

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[17] A bankruptcy court subsequently granted it leave to reject the 1981 NBCWA.

had agreed to the terms of the 1974, 1978, 1981 and 1984 NBCWAs "factually distinguishes Anker's situation from that of Eastern Enterprises and compels a finding that the Act is constitutional in this instance." 177 F.3d at 172. There, Consolidation Coal contracted with King Knob Coal for King Knob to mine coal on Consolidation's property from 1967 to 1982. As part of this arrangement, King Knob agreed that its employees would be UMWA members and that it would be a signatory to the then current NBCWAs.[18]

An affiliate of Anker acquired King Knob in 1975 and the relationship between Consolidation and King Knob continued until 1982 when Consolidation canceled its contract with King Knob. In 1994 and 1995, the Commissioner informed Anker that it was a related person to King Knob and assigned premium liability to Anker for King Knob's retired miners. Anker sued alleging that the Commissioner's assignments were unconstitutional under *Eastern Enterprises*. In rejecting that claim, we relied upon our earlier decision in *Unity* and held that because Anker's related person had agreed to be bound by the terms of the post-1974 NBCWAs, Anker's situation "falls outside the specific holding of *Eastern Enterprises*." *Id.* at 172. Accordingly, we concluded that the Act could constitutionally apply to Anker. *Id.*

Berwind nonetheless attempts to avoid being caught between the pincers of our prior case law. Berwind first

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[18] To achieve that end, King Knob signed "me too" agreements in 1974, 1978, 1981 and 1984. A "me too" agreement is an agreement whereby an employer who is not a member of the BCOA agrees with the UMWA to be bound by the terms of the NBCWA. *Anker Energy*, at 166-167. A "me too" agreement has terms identical to the terms of a NBCWA and there is no distinction regarding an employer's contractual rights and obligations. *Id.* at 172 n.4. Thus, the distinction between a NBCWA signatory and a "me too" signatory is without a difference. *Id.*

argues that even if its related person status to Reitz means that it is not in a substantially identical position to Eastern Enterprises, it nonetheless cannot be liable for the health care premiums of its own retirees. Berwind claims this is because the Coal Act does not permit the Commissioner to treat Berwind as if it has signed the 1974 and later NBCWAs since Reitz, its related person, signed the 1974 and later NBCWAs. Put another way, Berwind argues that the Act does not allow the Commissioner to impute Reitz's signatory status to Berwind.

The Commissioner counters by pointing out that he has not imputed Reitz's signatory status to Berwind. Rather, the Commissioner claims that he has merely imputed employment status to all members of the same controlled group as the Coal Act requires. Therefore, argues the Commissioner, Berwind's assignment is based upon its own liability as part of a controlled group. According to the Commissioner, "[a]ny employment of a coal industry retiree in the coal industry by a signatory operator shall be treated as employment by any related persons to such operator." 26 U.S.C. § 9706(b)(1)(A). Consequently, the Commissioner argues that under the express provisions of the Coal Act, all of Berwind's former employees are treated as Reitz's former employees. Thus, in the Commissioner's view, Berwind's premium liability is based on the imputation of employment by one member of a controlled group to all members of that controlled group and not on the imputation of signatory status.

Berwind responds by arguing that the Commissioner's claim that § 9706(b)(1)(A) imputes employment status to all members of the same controlled group (or more concretely, that § 9706(b)(1)(A) means that Berwind's former employees are treated as Reitz' former employees) is based on a misconstruction of the statute. Berwind claims that § 9706(b)(1)(A) is not a statute that imputes employment

status at all. Rather, it is merely an aggregation rule describing a method for deciding which of a miner's former employers to assign the former miner to. Berwind correctly notes that § 9706(b)(1)(A) -- captioned "Aggregation rules (A) Related Person" -- and which provides that "[a]ny employment of a coal industry retiree in the coal industry by a signatory operator shall be treated as employment by any related persons to such operator:" -- only applies "for purposes of subsection [9706](a)." Section § 9706(a) sets out the criteria for assigning a former miner to a particular entity from among multiple coal operators that may have employed the miner.

Berwind argues that within the context of the broader § 9706(a) assignment scheme, § 9706(b)(1)(A) authorizes the Commissioner to aggregate the periods of time that a miner worked for two or more "related person" companies as the Commissioner determines which signatory operator to assign the miner to Berwind further argues that aggregation of a miner's employment time with two "related person" operators is potentially important because the length of time of a miner's employment is one of the factors used to determine assignments under the § 9706(a) scheme. Thus, says Berwind, § 9706(b)(1)(A) merely facilitates the assignment of individual former miners to signatory operators under the general § 9706(a) assignment scheme. According to Berwind, it does not allow the Commissioner to impute employment of a retired miner to all members of a controlled group.

However, we do not have to decide which of these intricate and overly technical readings is correct. Berwind does not claim that retired miners (or their dependents) were mistakenly assigned to it.[19] Rather, it claims that the

[19] The Coal Act provides that if an assigned operator believes that it has been erroneously assigned beneficiaries, the operator can obtain

assignments, though factually correct, render the Act unconstitutional as applied and that the assignments are therefore invalid. This is not an issue of statutory construction. Berwind's challenge distills down to its claim that it is in a substantially identical position to *Eastern Enterprises*, and it does not turn on the hypertechnical statutory construction it urges upon us. Moreover, it has not challenged the "related person" provision of the Act. Therefore, "[Berwind's] obligations under *Eastern* must stand or fall regardless of how [it] was assigned the beneficiaries." *Unity Real Estate*, at 655 n.2.

Berwind next argues that our *Unity Real Estate* and *Anker Energy* decisions do not support a finding that the Coal Act is constitutional as applied to it. According to Berwind, *Unity* and *Anker* hold that retired coal miners can be assigned to a related person of their former employer only if the former employer made promises of lifetime benefits to those miners by signing the 1974 or later NBCWAs. But, says Berwind, because it never signed the 1974 or subsequent NBCWAs, and thereby never promised lifetime health benefits to its former employees, its former employees cannot constitutionally be assigned to it, even though its related person, Reitz, did sign the 1974 and subsequent NBCWAs.

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information about the beneficiaries from the Commissioner and seek review of the assignments. 20 C.F.R. § 9706(f); *see also* 20 C.F.R. §§ 422.601-607. The burden is on the assigned operator to make out a prima facie case that the assignments were in error. *See* 20 C.F.R. § 422.605. If the Commissioner finds that the assignments were in error, he can declare them void and reassign the beneficiaries to the appropriate signatory operator or related person. 26 U.S.C. § 9706(f)(3)(A). If the Commissioner finds that the assignments are not in error, he must notify the assigned operator. The Commissioner's determination is final. 26 U.S.C. § 9706(f)(3)(B).

Berwind is wrong. In *Anker*, we upheld premium liability against a parent company because the parent company's related person had agreed to be bound by the terms of the 1974 and subsequent NBCWAs. Thus, we suppose that superficially *Anker* could be read as supporting Berwind's claim that it can only be bound if its related person agreed to the 1974 or subsequent agreements. However, Berwind's reading is extremely restrictive and ignores the fact that *Anker* was decided after *Unity* and applied principles established in that case.

Unity was not limited to holding that related persons to coal companies that signed the 1974 and subsequent NBCWAs are in a different position to Eastern Enterprises. We also applied a substantive due process analysis based upon a concern raised in *Eastern Enterprises*. The plurality in Eastern noted that the Court's prior decisions have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience. *Eastern*, 524 U.S. at 528-529 (plurality). Recognizing that possibility, and "[t]o the extent that *Eastern* embodies principles capable of broader application," we felt obligated to apply an additional level of substantive due process analysis to determine if the assignments to the Companies there were constitutional as applied.[20] *Unity*, 178 F.3d at 659. That additional level of analysis focuses on "the

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[20] Although the plurality's cautionary note that legislation might be unconstitutional if it is severely retroactive and substantially disproportionate was made in the course of its Takings Clause analysis, the admonition is applicable to a substantive due process analysis as well. As the plurality noted in Eastern, "[o]ur analysis of legislation under the Takings and Due Process Clauses is correlated to some extent." 524 U.S. at 537 (plurality) (citing *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986)).

extent of the gap between the coal companies' contractual promises to the Funds and the requirements of the Coal Act." *Id.*

We noted that the standard of review of legislation when a due process violation is alleged "is forgiving; it bars only arbitrary and irrational congressional action." *Id.* The first step in our due process analysis was an extensive review of the available evidence to determine if Congress had a sufficient basis to impose liability on companies "related" to coal companies that signed the 1974 or later NBCWAs. We weighed that evidence against four separate criteria, viz., responsibility for the Combined Fund's instability, the background of government regulation of the coal industry, the relevant contractual language and a company's history in the coal industry. *Id.* at 660-699. We concluded that Congress' finding that the coal industry's conduct created a reasonable expectation in the miners of lifetime benefits and its finding that the coal companies were primarily responsible for the deterioration of the Benefit Plans were "reasonable evaluations of the problem." *Id.* at 670.

Next, we focused on the Act's retroactivity and found that the retroactive reach of the Act was not irrational under the Due Process Clause. *Id.* We recognized that "[t]he heart of a retroactivity analysis is an evaluation of the extent of the burden imposed by a retroactive law in relation to the burdened parties' prior acts," and we held that "[w]here Congress acts reasonably to redress an injury caused or to enforce an expectation created by a party, it can do so retroactively." *Id.* at 670, 671. In examining the retroactivity in *Unity*, we first measured the time between a post-1974 related person signatory's commitment to pay for benefits and the date of the enactment of the Coal Act. *Id.* at

670. For Unity, the period of time was eleven years.[21] We found that this period of time, while "quite long," was "not so extensive as to violate Justice Kennedy's standard,[22] although Unity offers a close case["] *id.*, despite the considerable financial burden imposed under the Act.[23]

Finally, we held that the burden imposed was not so unreasonable or disproportionate as to defeat the constitutionality of the Act.[24] The burden imposed, though not inconsequential, is justified by the industry's conduct of creating reasonable expectations of lifetime benefits, while establishing inadequately funded benefit funds. All this was compounded by the flight of operators from the coal industry seeking to avoid further contributions to the fund. *Id.* at 673. The Coal Act "is Congress's attempt to do equity." *Id.* at 672. The Coal Act did not violate substantive due process

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[21] The Coal Act was passed in 1992 and South Union-WVA, Unity's related person, last signed a NBCWA in 1981.

[22] In *Unity*, we relied on Justice Kennedy's "explication of the relevant due process principles because the plurality did not reach Eastern's due process claim." 178 F.3d at 670 n.13.

[23] Eastern Enterprises' estimated liability was between $50 and $100 million. 524 U.S. at 529. Unity alleged that its estimated Coal Act liabilities were over six times its total assets and that if the assignments were upheld, it would be bankrupted. 178 F.3d at 655. At the time Unity's appeal was before us, Unity's total payments were under $1 million. *Id.* at 671.

[24] A statute will not violate substantive due process where the burden imposed is "proportional to the harm legitimately addressed by the legislature." *Unity*, at 671. Thus, a statute is not unconstitutional "if the liability actually imposed is not out of proportion to the claimant's prior experience with the object of the legislation." *Id.* at 672. "Prior experience can consist of conduct that creates reasonable expectations about the object of the legislation or conduct that creates the problems that impelled the legislature to act." *Id.*

because Congress was entitled to remedy the problems caused by "the companies' actions, through the BCOA through which negotiations with the unions were conducted, [which] created reasonable expectations about benefits and established a funding structure vulnerable to 'dumping' retirees when companies left the industry." *Id.* at 673. We concluded that the Coal Act "is targeted to address the problem of insufficient resources in the benefit funds and that it puts the burden on those who, in Congress's reasonable judgment, should bear it."[25] *Id.* at 674.

Despite the additional level of due process scrutiny we subjected the Commissioner's assignments to, we found that the Coal Act was constitutional as applied to Unity Real Estate Company.[26] A close examination of the facts in *Unity* confirms that we did not hold, as Berwind claims, that retired miners can be assigned to a related person of their former employer only if the former employer signed the 1974 or later NBCWAs. In fact, the assignments we upheld there were much more problematic than the assignments to Berwind.

As we have noted, Unity Real Estate was a small corporation closely held by the members of one family. It owned a small commercial building and a parking lot. It had never been in the coal business, had never mined coal and

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[25] Ironically, given Berwind's structural evolution and network of changing affiliates and names, it could be argued that Berwind's involvement in the coal industry reflects precisely the kind of "corporate shell game" that Congress was concerned about when it enacted the Coal Act.

[26] In *Anker Energy*, we applied that same level of substantive due process analysis to the Commissioner's assignments to Anker. Anker's related person had agreed to post-1974 NBCWAs, and we upheld the challenged assignments. 177 F.3d at 172-173.

had never signed a NBCWA.[27] But, it had been a "related person" to several, defunct coal mining companies formed by members of the family that owned Unity Real Estate that were ultimately merged into Unity Real Estate. One of those companies, South Union-PA had mined coal since 1923, and had signed the 1947 NBCWA and amendments thereto through 1961, but had ceased mining coal in 1961. Another company, South Union-WVA, started mining coal in 1961 when South Union-PA stopped, and it thereafter signed the 1974, 1978 and 1981 NBCWAs, although a bankruptcy court allowed it to reject the 1981 NBCWA. Two other "related person" companies, Stewart Coal & Coke Company and Jamison Coal Company, did sign NBCWAs from the 1940s through the early 1970s. However, they never signed the 1974 or subsequent NBCWAs.

Despite the significant gulf separating Unity Real Estate and coal mining, the Commissioner assigned Combined Fund beneficiaries to Unity Real Estate for the miners formerly employed by all of Unity Real Estate's related person entities. This included miners who had worked for Unity Real Estate's related person entities who had never signed a 1974 or later NBCWAs as well as miners who had worked for Unity Real Estate's related person entity that had signed the 1974 and subsequent NBCWAs (i.e. South Union-WVA).

The majority of the Combined Fund beneficiaries assigned to it had not worked for South Union-WVA. Rather, they had worked for related persons that had signed only pre-1974 agreements. Jt. App. at 230 (Unity Real Estate's Responses to Defendants' First Request for

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[27] Because it never mined coal and never signed a coal wage agreement, we can assume that Unity was never a member of the BCOA.

Admissions, at ¶ 28).[28] However, we found no substantive due process impediment to holding Unity Real Estate liable for the Coal Act assignments of miners whose former employers never made a promise of lifetime health benefits. So long as one related person member of the controlled group made a promise of lifetime health benefits to its retired miners, substantive due process did not prevent that promise from inuring to the benefit of all retired miners employed by each related person member of the controlled group even if those members never made such promises. Since substantive due process considerations did not invalidate the Commissioner's assignments to Unity Real Estate, we are at a loss to understand how Combined Fund beneficiary assignments to a company like Berwind, that was in the coal mining business until 1962 and continues to have ties to the coal industry, transcends substantive due process restrictions. Its related person was a signatory to the 1974, 1978 and 1981 NBCWAs.

Moreover, we note that Berwind's related person, Reitz, last signed a NBCWA in 1981. Thus, it is eleven years from the time Berwind's related person's contractual obligation to the Combined Fund ended to the passing of the Coal Act in 1992. That is exactly the period we found permissibly retroactive in *Unity*. Berwind does no better under the proportionality prong of *Unity*'s due process analysis. Since Berwind's related person was a signatory to the 1974, 1978 and 1981 NBCWAs, Berwind bears the same responsibility as the *Unity* plaintiffs for creating a reasonable expectation of lifetime health benefits and for creating the problem of under-funding that the Coal Act seeks to

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[28] Out of a total of 63 Combined Fund beneficiaries assigned to Unity Real Estate, only 10 had worked for the post-1974 signatory, South Union-WVA. *Id.* The remaining 53 beneficiaries assigned had worked for the various pre-1974 signatories.

remedy.[29] Accordingly, we conclude that Berwind is not in a substantially identical position to Eastern Enterprises, and since Berwind's assignments survive our *Unity* substantive due process analysis, the Coal Act is not unconstitutional as applied to Berwind.[30]

VIII. CONCLUSION

Because we hold that the Coal Act is constitutional as applied to Berwind, we will reverse the district court's grant of summary judgment to Berwind on its APA claim (Count V) and its common law claim for restitution. We will affirm the district court's grant of summary judgment to the defendants on Berwind's claims that the Coal Act is unconstitutional as applied and unconstitutional in its entirety (Counts I, II and III). Accordingly, the district court correctly granted summary judgment in favor of defendants on Berwind's claim for a premium refund under the Coal Act (Count IV), its claim for a premium refund under ERISA (Count VII) as well as its claim for a tax refund against the United States (Count VIII).

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[29] We realize that Berwind was originally assigned Combined Fund liability for more than 1,900 of its former employees to whom it never made a promise of lifetime health benefits. However, despite that apparent numerical disproportionality, it is clear under *Unity* that the Constitution is not a bar to the assigning Berwind responsibility for all of the miners under the "controlled group" provisions of the Coal Act.

[30] After this case was argued, the Supreme Court decided *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002). That case involved a question of statutory construction centering on whether the Coal Act permits the Commissioner to assign retired miners to successors in interest of out-of-business signatory operators. That question is not presented here, and *Barnhart* therefore has no bearing on the issue presented in these consolidated appeals.

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for the Third Circuit

PRECEDENTIAL

Filed October 15, 2002

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-3729/3798/3830.

BERWIND CORPORATION

v.

COMMISSIONER OF SOCIAL SECURITY; UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND; MICHAEL H. HOLLAND; WILLIAM P. HOBGOOD; MARTY D. HUDSON; THOMAS O.S. RAND; ELLIOT A. SEGAL; CARL E. VANHORN; GAIL R. WILENSKY, as Trustees of the United Mine Workers of America Combined Benefit Fund; THE UNITED MINE WORKERS OF AMERICA 1992 BENEFIT PLAN; A. FRANK DUNHAM, as Trustee of the United Mine Workers of America 1992 Benefit Plan; UNITED STATES OF AMERICA

United Mine Workers of America Combined Benefit Fund, Michael H. Holland, William P. Hobgood, Marty D. Hudson, Thomas O.S. Rand, Elliot A. Segal, Carl E. VanHorn, Gail R. Wilensky, The United Mine Workers of America 1992 Benefit Plan, A. Frank Dunham, United States of America,

Appellants No. 00-3729

BERWIND CORPORATION,

Appellant No. 00-3798

v.

COMMISSIONER OF SOCIAL SECURITY; UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND; MICHAEL H. HOLLAND; WILLIAM P. HOBGOOD; MARTY D. HUDSON; THOMAS O.S. RAND; ELLIOT A. SEGAL; CARL E. VANHORN; GAIL R. WILENSKY, as Trustees of the United Mine Workers of America Combined Benefit Fund; THE UNITED MINE WORKERS OF AMERICA 1992 BENEFIT PLAN; A. FRANK DUNHAM, as Trustee of the United Mine Workers of America 1992 Benefit Plan; UNITED STATES OF AMERICA

BERWIND CORPORATION

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COMMISSIONER OF SOCIAL SECURITY; UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND; MICHAEL H. HOLLAND; WILLIAM P. HOBGOOD; MARTY D. HUDSON; THOMAS O.S. RAND; ELLIOT A. SEGAL; CARL E. VANHORN; GAIL R. WILENSKY, as Trustees of the United Mine Workers of America Combined Benefit Fund; THE UNITED MINE WORKERS OF AMERICA 1992 BENEFIT PLAN; A. FRANK DUNHAM, as Trustee of the United Mine Workers of America 1992 Benefit Plan; UNITED STATES OF AMERICA

Commissioner of Social Security,

Appellant No. 00-3830

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(Civil Action No. 98-cv-05985)
District Judge: Hon. Jay C. Waldman

Argued: September 19, 2001

Before: SLOVITER, NYGAARD and McKEE,
Circuit Judges

(Opinion Filed: October 2, 2002)

ORDER AMENDING OPINION

IT IS HEREBY ORDERED, that the Slip Opinion filed in this case on October 2, 2002, be amended as follows:

On page 4, line 9 of first paragraph, delete the words "Coat Act" and replace them with "Coal Act."

IT IS SO ORDERED.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BERWIND CORPORATION	:	
	:	
v.	:	
	:	
KENNETH S. APFEL, UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND, MICHAEL H. HOLLAND, WILLIAM P. HOBGOOD, MARTY D. HUDSON, THOMAS O.S. RAND, ELLIOT A. SEGAL, CARL E. VAN HORN, GAIL R. WILENSKY, as Trustees of the United Mine Workers of America Combined Benefit Fund, THE UNITED STATES OF AMERICA, THE UNITED MINE WORKERS OF AMERICA 1992 BENEFIT PLAN and MICHAEL H. HOLLAND, MARTY D. HUDSON, ELLIOT A. SEGAL, A. FRANK DUNHAM, as Trustees of the United Mine Workers of American 1992 Benefit Plan	:	**CIVIL ACTION** **NO. 98-5985**

MEMORANDUM

WALDMAN, J. **March 31, 2000**

I. Introduction

Plaintiff is a corporation which was previously engaged in the coal mining business. It was a signatory to collective bargaining agreements with the United Mine Workers of America ("UMWA") in the 1950s and early 1960s. Plaintiff was assigned responsibility under the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act") to fund lifetime health benefits for retired members of the UMWA and certain of their dependents.

Defendant Apfel is Commissioner of Social Security. As such, he is responsible for assigning beneficiaries to operators which are then required to make premium payments to the UMW Combined Benefit Fund ("Combined Fund") and 1992 Benefit Plan ("1992 Plan"), entities created or reconfigured by the Coal Act.

Defendants Holland, Hobgood, Hudson, Rand, Segal, Van Horn and Wilensky are trustees of the Combined Fund. Defendants Holland, Hudson and Segal are also trustees of the 1992 Plan as is defendant Dunham.

In Counts I and II Berwind respectively seeks declarations that the application of the Coal Act by the Commissioner to assign responsibility for beneficiaries to plaintiff pursuant to § 9706(a)(3) violates the Due Process Clause and the Takings Clause of the Fifth Amendment. In Count III, plaintiff asserts that "the entire Coal Act must be invalidated as unconstitutional" because "Congress would not have enacted the Coal act without Section 9706(a)(3)." In its prayer for relief, however, plaintiff does not actually request a declaration that the Coal Act is unconstitutional.

In Count IV, plaintiff asserts a claim pursuant to the Coal Act, 26 U.S.C. § 9706(f)(3), for a refund of premiums for assigned Combined Fund beneficiaries which the

Commissioner refused to withdraw and Combined Fund trustees refused to return following a Supreme Court decision that application of the Act to an entity similarly situated to plaintiff was unconstitutional.

In Count V, plaintiff asserts a claim under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A). Plaintiff alleges that the Commissioner acted arbitrarily, capriciously and inconsistently with the law and abused his discretion when he declined to void Berwind's assignments while doing so for similarly situated companies following that Supreme Court Decision. Berwind seeks an order setting aside that decision.

In Counts VI, VII and VIII, Berwind asserts alternative claims to recover premiums it has paid since April 4, 1995 to the Combined Fund and 1992 Plan ("the Funds"). In Count VI, plaintiff asserts a federal common law claim for restitution for these premiums. In Count VII, plaintiff seeks a refund of these premiums under ERISA. In Count VIII, plaintiff seeks a refund from the United States pursuant to 26 U.S.C. § 7422 of any Combined Fund premiums plaintiff is unable to obtain from the Fund. In a prayer for relief section, plaintiff also seeks to enjoin the Commissioner and the United States from applying the Coal Act to Berwind and to enjoin the Funds from assessing or attempting to collect outstanding premiums.

The Funds and their trustees ("the Trustees") have asserted several corresponding counterclaims. In Count I, they seek a declaration that the Coal Act is constitutional as applied to Berwind.[1] In Count II, they seek to recover under

[1] The Trustees submit a draft order with a proposed declaration that the Coal Act "is constitutional on its face and as applied to plaintiff." In the actual counterclaim, however, the prayer for relief is specifically limited to a request for a declaration that the Act "as applied to Counterclaim

ERISA from Berwind unpaid premiums for assigned Combined Fund beneficiaries since July 1998. In Count III, they seek the same regarding the 1992 Plan. In Count IV, they seek payment of current assessed premiums and to enjoin Berwind from disposing of assets until it satisfies all obligations to the Funds or from failing to comply with future Coal Act obligations.

All defendants assert that plaintiff's claims are barred by res judicata and collateral estoppel as a result of a judgment rendered on April 4, 1995 in a prior lawsuit in the Northern District of Indiana in which plaintiff asserted a similar challenge to the constitutionality of the Coal Act as applied.

Plaintiff has filed a motion for summary judgment on its Fifth Amendment claims in Counts I and II. The Commissioner and the United States (the "federal defendants") have filed a motion for summary judgment on plaintiff's claims. The Trustees have filed a motion for summary judgment on their counterclaims.[2]

II. Legal Standard

In considering each motion for summary judgment, the court determines whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to

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Defendant Berwind does not violate the Due Process or Takings Clauses."

[2] The Trustees have not moved for summary judgment on plaintiff's claims against them. The Trustees' motion concludes with a request only that the court "deny Berwind's motion" and "enter judgment [for the Trustees] on their counterclaims."

judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case are "material." Anderson, 477 U.S. at 248. All reasonable inferences from the record are drawn in favor of the non-movant. Id. at 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S. 921 (1991). A plaintiff cannot avert summary judgment by resting on the allegations in his pleadings, but rather must present competent evidence from which a fact-finder could reasonably find in his favor. Anderson, 479 U.S. at 248; Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999); Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995).

III. Facts

While the parties obviously disagree on the ultimate conclusions to be drawn, they do not disagree about what relevant facts are established on the record presented. These uncontroverted facts and the pertinent history are as follow.

The Coal Act

Following a nationwide strike in 1946, the UMWA and the Bituminous Coal Operators' Association ("BCOA"), a multi-employer group of coal producers, executed the first National Bituminous Coal Wage Agreement ("NBCWA"). The 1947 NBCWA specified terms and conditions of

employment in the mines and provided health and pension benefits to miners.

A new NBCWA was signed in 1950 which provided that the BCOA would create a welfare and retirement fund financed by a per ton levy on coal mined by signatory coal producers. The 1950 Fund was designed to receive employer contributions and to use the funds to provide health benefits to current and retired miners and, in certain cases, family members. Additional NBCWAs were signed over the next twenty years.

Following the passage of ERISA, the 1950 Fund was restructured in 1974. The 1974 NBCWA created four separate multiemployer plans, two covering pension benefits and two dealing with non-pension benefits. The latter were the 1950 Benefit Plan which provided health benefits to coal workers who retired prior to 1976, and the 1974 Benefit Plan which covered those who retired on or after January 1, 1976. The 1974 NBCWA guaranteed that miners and their dependants would retain their health benefits "for life."

The 1978 NBCWA incorporated a new provision to ensure health care for "orphaned" miners, those whose employers had abandoned the coal industry, as well as "guarantee" and "evergreen" provisions to ensure the solvency of the Plans. The "guarantee" clause obligated signatories to make sufficient contributions to maintain benefits at the negotiated levels during the period of the agreement. The "evergreen" clause required signatories who continued to mine coal to make benefit contributions for as long as such contributions were required by future NBCWAs, regardless of whether a particular operator actually signed the subsequent agreements. The 1978 NBCWA shifted responsibility for miners leaving covered service on or after January 1, 1976 from the UMWA multiemployer system to individual coal companies, with the

1974 Plan reserved as an "orphan" plan for retirees whose former employers went out of business.

The Plans were plagued by economic problems. By 1990, the 1950 and 1974 Benefits Plans had incurred a deficit of $110 million. The Secretary of Labor set up the Coal Commission to find a way to reinvigorate the Plans to ensure that retirees would continue to receive their health benefits.

In response to the Coal Commission's report, Congress enacted the Coal Act. Effective July 20, 1992, the Act combined the 1950 and 1974 Plans into a single plan called the United Mine Workers of America Combined Benefit Fund ("Combined Fund"). See 26 U.S. C. § 9702(a)(2). The Combined Fund was meant to ensure that all retirees who were eligible to receive health benefits from the preexisting Plans would obtain them from the Combined Fund. It encompasses persons who were receiving benefits as of July 20, 1992 under the 1950 or 1974 Plans.

The Coal Act also created the United Mine Workers of America 1992 Benefit Plan ("1992 Plan"). See 26 U.S.C. § 9712. The 1992 Plan was designed to provide benefits to eligible retirees and their dependants who were not beneficiaries of the Combined Fund. See 26 U.S.C. § 9712(b)(1). The 1992 Plan is limited to individuals who retired on or before September 30, 1994. The 1992 Plan thus encompasses persons who retired between July 21, 1992 and September 30, 1994.

The Coal Act directs the Commissioner to assign each coal industry retiree who is an eligible beneficiary to a signatory operator or any "related person." See 26 U.S.C. § 9706(a). "Signatory operator" means a person who signed any NBCWA or other agreement requiring contributions to the 1950 or 1974 Benefit Plans. See 26 U.S.C. § 9701(c)(1).

Any signatory operator who "conducts or derives revenue from any business activity, whether or not in the coal industry," may be liable for those premiums. See 26 U.S.C. § 9706(a); § 9701(c)(7). Where a signatory is no longer involved in any business activity, premiums may be levied against a "related person." Whether companies are "related persons" is determined as of July 20, 1992. See 26 U.S.C. § 9701(c)(2)(B).[3]

The Commissioner assigned eligible beneficiaries to particular signatory operators or related persons as prescribed by the Coal Act. The assignments are adjusted with the beginning of a new "plan year" each October 1st. Annual premiums are calculated for each plan year and then due on a monthly basis.

Assignments are made:

(1) First, to the signatory operator which--

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[3] The Act defines related persons as follows:
(A) In general--A person shall be considered to be a related person to a signatory operator if that person is--

(i) a member of the controlled group of corporations (within the meaning section 52(a) [of the Internal Revenue Code]) which includes such signatory operator;

(ii) a trade or business which is under common control (as determined under section 52(b) [of the Internal Revenue Code]) with such signatory operator; or

(iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.

A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).
26 U.S.C. §9701(c)(2)(A).

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.

(2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which--

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.

(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

26 U.S.C. §9706(a).

Eligible beneficiaries who are not otherwise assignable under the Act receive benefits from a pool of reserved funds or, if necessary, from premiums assessed proportionately against all assigned operators. See 26 U.S.C. § 9704(a)(3) &(d). It has been unnecessary to date to assess any such premiums.

Berwind

Under the Coal Act, Berwind has been assigned Combined Fund and 1992 Plan beneficiaries. It is now responsible for monthly premium payments totaling more than $295,000 for 1,209 Combined Funds beneficiaries and monthly premiums of $567 for several 1992 Plan beneficiaries. Except for five Combined Fund beneficiaries,

these assignments have been on the basis of prior employment of the beneficiaries by the Berwind-White Coal Company.

Berwind-White changed its name to the Berwind Corporation on January 2, 1967. Berwind-White terminated coal mining operations in June 1962. Berwind-White was a signatory to the 1950 NBCWA as well as the 1951, 1952, 1955, 1956 and 1958 amendments. The Berwind Corporation has invested in a variety of businesses since 1962 and thus conducts business activity as defined by the Coal Act.

On January 31, 1963, Berwind-White acquired 98% of the shares of Reitz Coal Company ("Reitz") and later became sole shareholder. Reitz was an independent coal company with its own mines. Following the acquisition, it did not take over any of Berwind's mines which remained closed. At some point, Berwind shared one-half of its interest with an outside investor.[4] Reitz was a signatory to the 1950 NBCWA and its amendments and to the 1968, 1971, 1974, 1978 and 1981 NBCWAs.

On September 30, 1984, Reitz closed all of its mines and ceased coal operations.[5]

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[4] The name "Reitz" was used by three entities between 1963 to 1999. A detailed history of the company is set forth in the uncontroverted affidavit of Bruce Reed submitted with plaintiff's summary judgment motion. Except for the facts regarding Reitz set forth in the body of the memorandum, no party has suggested that the history of Reitz has any significance to the instant action.

[5] Of the 1,209 Combined Fund beneficiaries assigned to Berwind, five worked for Reitz. Berwind is challenging only the assignment to it of beneficiaries who worked for it prior to its leaving the coal business in 1962. In its words, "Berwind does not and never has challenged its joint and several liability for Reitz's premiums."

Prior Litigation

On September 2, 1993, Berwind and three co-plaintiffs filed suit in the United States District Court for the Southern District of Indiana challenging under the Due Process and Takings Clauses the constitutionality of the assignment of liability to them for Combined Fund beneficiaries under the Coal Act. ("Berwind I"). They sought a declaration that the Act was unconstitutional as applied to them and an injunction to bar enforcement of the statute against them.

On April 4, 1995, the District Court rejected that constitutional challenge and granted the cross-motions for summary judgment of defendant Donna Shalala, Secretary of Health and Human Services, and of intervenor-defendants, the Combined Fund and its Trustees. See Templeton Coal Co., Inc. v. Shalala, 882 F. Supp. 799 (1995). After consolidating the Berwind I appeal with that of Davon, Inc., the Seventh Circuit affirmed and the Supreme Court denied certiorari. See Davon, Inc. v. Shalala, 75 F.3d 1114 (7th Cir.), cert. denied, 519 U.S. 808 (1996).[6]

Eastern Enterprises

Two years after denying certiorari in Berwind I, the Supreme Court entertained a challenge to the constitutionality of the Coal Act as applied to another petitioner. See Eastern Enterprises v. Apfel, 118 S. Ct. 2131 (1998).

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[6] Neither the District nor Circuit Court discussed the related person provision. The District Court did not mention Reitz in its opinion. The Seventh Circuit briefly mentioned it in a one paragraph factual discussion of Berwind. Both Courts relied solely on Berwind's own activities in upholding the constitutionality of the Act as applied to Berwind.

While conducting coal mining operations, Eastern Enterprises ("Eastern") signed every NBCWA between 1947 and 1964. In 1965, Eastern transferred its coal operations to a wholly owned subsidiary, Eastern Associated Coal Corporation ("EACC"). From 1966 to 1987, Eastern effectively ran EACC with which it shared officers and supervising management. Eastern received 100% of EACC's $100 million in dividends. As EACC directors, Eastern officials ratified post-1965 bargaining agreements. Eastern retained its interest in EACC until 1987 when it was sold to an independent company.

Pursuant to § 9706(a)(3), The Commissioner assigned responsibility to Eastern for Combined Fund beneficiaries it had employed prior to 1966 based on its status as the pre-1978 signatory operator for whom the miners had worked the longest. The Court specifically noted that Eastern's assigned liability under the Act "bears no relationship to its ownership of EACC" as it was assigned responsibility for benefits "relating to miners that Eastern itself, not EACC, employed." Id. at 2149-50.

Based on the retroactivity of the statute, a majority of the Court struck down the law as applied to Eastern. The four-justice plurality held that application of the Coal Act to Eastern amounted to an unconstitutional taking. The plurality held that Eastern could not constitutionally be required on the basis of its activities decades earlier to bear the economic burden of funding lifetime health benefits it never promised and reasonably could not have contemplated. Justice Kennedy, who provided the fifth vote striking down the application of the Act, concluded that the Coal Act as applied to Eastern was impermissibly retroactive as Eastern was not responsible for the beneficiaries' expectations of lifetime benefits or for the perilous condition of the 1950 and

1974 Plans. The decision was handed down on June 25, 1998.[7]

Action of the Commissioner

On September 24, 1998, the Commissioner decided to void the assignments of beneficiaries to operators similarly situated to Eastern. The Commissioner determined that 113 operators were so situated and qualified for such relief. These included Berwind's co-plaintiffs in Berwind I. It was also decided no beneficiaries would be assigned to another eleven similarly situated companies which had not received assignments. Each company whose assignments were voided had ceased to be a signatory to a UMWA agreement prior to the 1974 NBCWA.

Berwind ceased making premium payments after June 1998 and wrote to the Commissioner on July 15, 1998 requesting that its assignments be voided. Plaintiff sent a follow-up letter to the Counsel to the Commissioner on August 21, 1998, including more detailed information regarding the similarity between Berwind and Eastern. The Commissioner declined to void Berwind's assignments.

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[7]Following Eastern Enterprises, the Third Circuit opined that a majority of the Supreme Court would find unconstitutional an application of the Act to a company that had not agreed to the 1974 or a later NBCWA. See Anker Energy Corp. v. Consolidation Coal Co., 177 F.3d 161, 172 (3d Cir. 1999).

IV. Discussion

A. Plaintiff's Declaratory Judgment Claims

1. Berwind's Identity to Eastern Enterprises

Eastern Enterprises requires a finding that the Coal Act is unconstitutional as applied to another company if that company "stand[s] in a substantially identical position to Eastern Enterprises with respect to both the plurality and Justice Kennedy's concurrence." Anker Energy Corp. v. Consolidation Coal Co., 177 F.3d 161, 170 (3d Cir. 1999); Unity Real Estate Co. v. Hudson, 178 F.3d 649, 659 (3d Cir. 1999).

The Supreme Court in Eastern Enterprises emphasized that Eastern had ceased mining coal decades prior to enactment of the Coal Act, had not signed the 1974 or any later NBCWA and was not responsible for the beneficiaries' expectations of lifetime benefits. As forcefully noted by plaintiff, it left the coal business before Eastern and also never signed the 1974 or any later NBCWA.

In Unity Real Estate, the Third Circuit upheld the constitutionality of the Coal Act as applied to Unity. Unity was assigned beneficiaries pursuant to § 9706(a)(1) or (a)(2) as a related person to several coal mining companies which it absorbed. These companies signed various NBCWAs throughout the 1960s and 1970s, including the 1974 and 1978 NBCWAs. The Court held that Unity was factually distinguishable from Eastern because Unity's assignments were based on employment of the beneficiaries by related companies which had promised to fund lifetime benefits. See Unity, 178 F.3d at 659.

In Anker Energy, the Third Circuit upheld the constitutionality of the Coal Act as applied to Anker. Anker

was assigned liability for certain beneficiaries as a related person to King Knob Coal Company which was no longer in business. King Knob had agreed to be bound by the terms of the NBCWAs through "me too" agreements which it signed throughout the 1970s and until 1984.[8] As a related person to King Knob, Anker was assigned liability for King Knob's retirees. As Anker was assigned liability based on its relation to King Kob, a 1974 and later NBCWA signatory, the Court held that Anker was not in a substantially identical position to Eastern Enterprises. See Anker, 177 F.3d at 172.

As noted, Eastern did not sign the 1974 or any later NBCWA and ceased its coal operations in 1965 when it transferred them to a wholly owned subsidiary, EACC. Eastern retained its interest in EACC until 1987. The Commissioner assigned beneficiaries to Eastern pursuant to § 9706(a)(3) based solely on its own coal operations. Only retirees who had worked directly for Eastern prior to 1966 were assigned to it. It was this assignment that the Supreme Court deemed unconstitutional.

Plaintiffs in Unity and Anker were assigned beneficiaries who worked for related companies which had signed the 1974 or later NBCWAs. As related persons, Unity and Anker were responsible for the funding of those workers' benefits. Unity and Anker were thus not in a substantially identical position to Eastern.

Like Eastern, Berwind challenges assignments of beneficiaries based solely on its own coal operations and roster of employees 30 or more years before the Coal Act was enacted. Like Eastern, Berwind did not sign the 1974 or

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[8] A "me too" agreement is an agreement between an employer who is not a NBCWA signatory and the UMWA by which the employer agreed to be bound by the terms of the NBCWAs.

any later NBCWA promising lifetime benefits. Berwind ceased mining coal in 1962, three years prior to Eastern. Like Eastern, Berwind was not responsible for its workers' expectations of lifetime benefits or for the perilous condition of the 1950 and 1974 Funds. Like Berwind, Eastern maintained an interest in coal mining through a subsidiary which signed the 1974 and later NBCWAs.

The only distinction between the two is that Eastern no longer had an interest in its subsidiary on July 20, 1992 and thus was not a "related person" under the Act, while Berwind is a related person to Reitz. In colloquial terms, the issue then is whether this is a distinction with a difference.

A majority of the Supreme Court refused for constitutional purposes to impute to Eastern the promise of benefits made by EACC in agreements executed by Eastern officers as directors of EACC. Defendants suggest that such a promise nevertheless may be imputed by operation of the related person provisions.

Defendants essentially argue that plaintiff could have been assigned related person liability for its own employees and thus "it makes no difference as a constitutional matter that Berwind has been assessed those premiums directly" under § 9706(a)(3). The gist of the argument is that Berwind's employees are deemed to be employees of Reitz by virtue of § 9706(b)(1)(A) and thus assignable to Reitz and thus assignable back to Berwind as a related person to Reitz. This argument does not withstand scrutiny.

The court's view that Reitz's status as a signatory to the agreements promising lifetime benefits cannot be imputed to Berwind is fortified by the Social Security Administration's own reading of the Act. In providing guidance to an official responsible for designations in its Southeastern Program Service Center, the Administration

stated in August 1994 that "[t]he Coal Act does not permit us to impute a related company's signatory status to that of the signatory operator; that is, a pre-1978 signatory cannot be treated as a 1978 (or later) signatory."

Beneficiaries may be assigned under § 9706(a)(1) or (a)(2) only to a 1978 signatory for which they worked or a related person to the signatory. A Berwind employee does not become an employee of Reitz by virtue of § 9706(b)(1)(A). That subsection does not literally impute employment by one employer to another. As its title reflects, it merely aggregates discrete periods of employment by different employers in calculating an employee's length of service for purposes of assignment. That a beneficiary may be assigned to an eligible assignee based in part on a period of employment by a related person does not literally make the beneficiary an employee of the assignee for the term of his employment with the related person.

The Commissioner thus could not assign to plaintiff beneficiaries under § 9706(a)(1) or (a)(2) based on their employment by plaintiff, a non-1978 signatory, or based on plaintiff's relation to Reitz which never employed them. Interestingly, the Commissioner in fact did not do so.[9]

Like Eastern, plaintiff was directly assigned under § 9706(a)(3) beneficiaries who had worked for it. The challenged assignments were not and could not have been made on the basis of plaintiff's related person status. The Court thus cannot conscientiously differentiate between Eastern and Berwind on that basis. The only way plaintiff could be liable for premiums for its own former employees is

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[9] Since Reitz ceased being in business, of course, no Berwind employee could be assigned to Reitz for theoretical assignment back to Berwind even under the defendants' reasoning.

by assignment via § 9706(a)(3). As to such assignments, Berwind stands in a substantially identical position to Eastern.[10] This, however, does not dispose of the matter.

2. Preclusion of Plaintiff's Constitutional Claims

Defendants assert that even if plaintiff and Eastern are substantially identical in their position, Berwind is nevertheless barred by preclusion principles from maintaining its claims.

The doctrine of res judicata or claim preclusion promotes finality, certainty and judicial efficiency by barring relitigation of claims. See Gregory v. Chehi, 843 F.2d 111, 116 (3d Cir. 1988). The preclusive effects of a federal court decision on a federal question are controlled in any subsequent federal court litigation by federal law. See Burlington Northern Railroad Co. v. Hyundai Merchant Marine Co., Ltd., 63 F.3d 1227, 1231 (3d Cir. 1995); Primo v. Sinclair, 1992 WL 185580, *1 (E.D. Pa. July 22, 1992);

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[10] As Eastern had not been assigned 1992 Plan beneficiaries, there is no specific reference to that Plan in Eastern Enterprises. The Combined Fund and the 1992 Plan are part of the same statutory scheme and assignment of beneficiaries is made in the same manner. Substantial identity to Eastern exists when the factors which led the plurality and Justice Kennedy to conclude that assignment to Eastern of its retirees was unconstitutional are present. Defendants have presented no principled basis for excluding 1992 Plan assignments from the reach of Eastern Enterprises when they are made in precisely the manner as Combined Fund assignments held constitutionally deficient. The Supreme Court did not rely on anything particular to the Combined Fund. The decision did not turn on the particular configuration or administrative segmentation of the health benefit program, but on the rationale for requiring an operator to pay benefits. What the court concluded was that an operator could not be forced to keep a promise of benefits it did not make and reasonably could not contemplate based on its activities decades before.

18 Wright, Miller & Cooper, Federal Practice and Procedure §4466 (1981).

The doctrine prevents a party from relitigating causes of action which were or could have been raised and decided in a prior suit. See Churchill v. Star Enters., 183 F.3d 184, 194 (3d Cir. 1999); United States v. Athlone Indus., Inc., 746 F.2d 977, 983 n. 4 (3d Cir. 1984). To demonstrate claim preclusion under federal law, a defendant must show that there has been a final judgment on the merits in a prior suit involving the same parties or their privies and a subsequent suit based on the same cause of action. Lubrizol Corp. v. Exxon Corp., 929 F.2d 960, 963 (3d Cir. 1991); Athlone Indus., 746 F.2d at 983. Application of the principles of claim preclusion "is not altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981). See also Barzin v. Selective Service Local Bd. No. 14, 446 F.2d 1382, 1383 (3d Cir. 1971).

The grant of summary judgment in Berwind I is a final judgment on the merits. See Hubicki v. ACF Industries, Inc., 484 F.2d 519, 524 (3d Cir. 1973); Williams v. Lehigh County Dept. of Corrections, 19 F. Supp. 2d. 409, 411 (E.D. Pa. 1998).

Privity exists where a party adequately represented the nonparties' interests in the prior proceeding. See Martin v. Wilks, 490 U.S. 755, 761 n.2 (1989)(a nonparty may be bound if his interests are "adequately represented by someone with the same interest who is a party"); Gambocz v. Yelncsics, 468 F.2d 837, 841 (3d Cir. 1972)(res judicata bars second action as to defendants who were not parties to first action when there is close or significant relationship between them and defendants who were parties); Williams v. City of Allentown, 25 F. Supp. 2d 599, 603 (E.D. Pa. 1998)(a losing

party may not again bring essentially the same cause of action against identical or closely related parties); Gambrell v. Hess, 777 F. Supp. 375, 381-82 (D.N.J. 1991)(plaintiff cannot relitigate same cause of action by substituting another defendant).

In Berwind I, plaintiff filed suit against Secretary Shalala, then in charge of assigning beneficiaries under the Coal Act. The Combined Benefit Fund and its trustees intervened as defendants. Berwind filed this suit against Kenneth Apfel as the official now responsible for assigning beneficiaries, the Combined Benefit Fund and its trustees, the 1992 Plan and its trustees and the United States. The United States, Commissioner Apfel and Secretary Shalala are in privity. It is under their authority that beneficiaries are assigned under the Act. They are jointly represented by the U.S. Department of Justice and have the same interest in upholding the statute and maximizing contributions. The interest of the 1992 Plan and its trustees in upholding the statute and maintaining Berwind's contributions were adequately represented by the Combined Benefit Fund and its Trustees, many of whom overlap. Indeed, the Combined Fund had an even greater incentive to defend as Berwind's assessed liability to the Combined Fund is substantially greater than to the 1992 Plan.

The parties to the present action or their privies were all parties in Berwind I.

Courts take a broad view of "cause of action." Churchill, 183 F.3d at 194. Two actions are generally deemed the same where there is an "essential similarity of the underlying events giving rise to the various legal claims." Lubrizol Corp., 929 F.2d at 964; Athlone Indus., 746 F.2d at 984. See also In Re Air Crash at Dallas/Ft. Worth Airport, 861 F.2d 814, 816 (5th Cir. 1988) (prior and subsequent claims are part of same "cause of action" if they arise from

same nucleus of operative facts). The pertinent factors include the similarity of the alleged acts and material factual allegations in each suit and of the witnesses and documentation required to prove each claim. See Lubrizol, 929 F.2d at 963; Athlone Indus., 746 F.2d at 984.

In Berwind I and the instant case, plaintiffs have challenged under the Takings and Due Process Clauses the assignment of beneficiaries under the Coal Act in an effort to defeat liability for assessed premiums. The alleged acts and material allegations are essentially the same as are the witnesses and documentation required to prove the respective claims.

In this case, Berwind challenges the propriety of the assignment of both Combined Fund and 1992 Plan beneficiaries. Plaintiff challenged only the assignment of Combined Fund beneficiaries in Berwind I. The requirement of an identity of causes of action refers not only to claims actually litigated, however, but also all claims arising out of the same underlying transactions or events which could have been litigated in the earlier proceeding. Lubrizol Corp., 929 F.2d at 964; Athlone Indus., 746 F.2d at 984. Claim preclusion bars any cause of action that a litigant asserted or could have asserted in the prior action. See Huck v. Dawson, 106 F.3d 45, 50 (3d Cir. 1997) (even denial of motion to amend complaint in prior action does not prevent preclusion of claim that could have been pled in original complaint).

Berwind had been assigned liability for at least one 1992 Plan beneficiary in February 1993, prior to filing suit in Berwind I, and clearly was aware that additional assignments could be made. Berwind could have challenged the constitutionality of making 1992 Plan assignments to it in Berwind I. Berwind's claim that the Act should be declared unconstitutional in its entirety upon a determination that §

9706(a)(3) is unconstitutional as applied to Berwind and others similarly situated also clearly could have been asserted in Berwind I.[11]

Plaintiff's declaratory judgment claims constitute the same causes of action. The alleged wrong for which redress was sought in both actions is the imposition of liability on plaintiff under the Coal Act in violation of the Due Process and Takings Clauses of the 5th Amendment. See Athlone Indus., 746 F.2d at 984 (what is pertinent is whether wrong for which redress is sought is the same and not whether plaintiff seeks different relief). Plaintiff in Berwind I sought a declaration that any assignment under § 9706(a)(3) to Berwind of its retirees was unconstitutional. Had Berwind prevailed, it effectively would have received the relief is seeks in this case.

That plaintiff's declaratory judgment claims per se are precluded does not, however, necessarily preclude relitigation of the issue of the constitutionality of assignments to plaintiff in the wake of Eastern Enterprises in any new cause of action. This is determined by application of principles of issue preclusion.

Plaintiff's APA and recoupment claims are new causes of action. The APA claim is based on an agency action undertaken on September 24, 1998 and thus could not have been litigated in Berwind I. The assessment of premiums for each plan year gives rise to a new cause of action with regard to the propriety of that assessment. See Comm'r of Internal Revenue v. Sunnen, 333 U.S. 591, 598 (1948); Comm'r of

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[11] It appears that the Eastern Enterprises litigation was initially predicated on the assignment of one Combined Fund beneficiary. See Eastern Enterprises v. Shalala, 942 F. Supp. 684, 686 (D. Mass. 1996).

Internal Revenue v. Thomas Flexible Coupling Co., 198 F.2d 350, 353 (3d Cir. 1952).

B. Preclusion of the Issue of Constitutionality

The doctrine of collateral estoppel or issue preclusion prevents the relitigation of issues of law or fact which have already been adjudicated on their merits, whether or not the subsequent suit is based on the same cause of action. See Allen v. McCurry, 449 U.S. 90, 94 (1980)(collateral estoppel applies to issues of law); Montana v. United States, 440 U.S. 147, 153 (1979)(once issue is actually and necessarily determined by court of competent jurisdiction, that determination is conclusive in subsequent suits based on different causes of action involving a party to the prior litigation); Witkowski v. Welch, 173 F.3d 192, 198 (3d Cir. 1999). Under federal law, issue preclusion applies if the issue sought to be precluded is the same as that decided in the prior action; that issue was actually litigated; the resolution of that issue was determined by and essential to a valid and final judgment; and, the party against whom the doctrine is invoked had a full and fair opportunity to litigate the issue in the previous suit. See Kremer v. Chemical Constr. Corp., 456 U.S. 461, 480-81 (1982); In re Docteroff, 133 F.3d 210, 214 (3d Cir. 1997); Burlington Northern R.R. v. Hyundai Merchant Marine Co., 63 F.3d 1227, 1231-32 (3d Cir. 1995); Zinman v. Prudential Ins. Co. of America, 909 F. Supp. 279, 282 (E.D. Pa. 1995).

A material change in the law or development in the controlling legal principles may vitiate issue preclusion. See Montana 440 U.S. at 155 (application of collateral estoppel is not appropriate when "controlling facts or legal principles have changed significantly since the [prior] judgment"); Sunnen, 333 U.S. at 600 ("a judicial declaration intervening between the two proceedings may so change the legal atmosphere as to render the rule of collateral estoppel

inapplicable"). Berwind is thus not barred from relitigating the issue of the constitutionality of the challenged assignments in prosecuting its APA and recoupment claims if the decision in Eastern Enterprises constitutes a significant change or development in the controlling legal principles or legal atmosphere.[12]

Courts have recognized as sufficiently significant changes an intervening judicial declaration, a modification or clarification of legal principles as enunciated in intervening decisions and an alteration in a pertinent statutory interpretation. See Sunnen, 333 U.S. at 600-01; Bingaman v. Department of Treasury, 127 F.3d 1431, 1437-38 (Fed. Cir. 1997)("a significant change in the 'legal atmosphere'--whether in the form of new legislation, a new court decision, or even a new administrative ruling--can justify a later court's refusal to give collateral estoppel effect to an earlier decision"); Graphic Communications Int'l Union, Local 554 v. Salem-Gravure Div. of World Color Press, Inc., 843 F.2d 1490, 1493 (D.C. Cir. 1988)(subsequent agency reinterpretation of statutory provision); Del Rio Distrib., Inc. v. Adolph Coors Co., 589 F.2d 176, 179 (5th Cir. 1979)(no preclusion for issue resolved according to precedent subsequently overruled by Supreme Court); Texaco, Inc. v. United States, 579 F.2d 614, 617 (Ct. Cl. 1978) (intervening decision of Supreme Court); Chicago and Illinois Midland Railway Co. v. Marsh, 577 F. Supp. 798, 806 (C.D. Ill. 1984) (intervening Supreme Court decision); U.S. v. General

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[12] While the Commissioner's action of September 24, 1998 was prompted by a decision based on a constitutional determination, resolution of plaintiff's APA claim does not literally require relitigation of constitutional issues. In the strictest sense it requires a determination of whether Berwind is positioned so like the 124 companies whose assignments were voided that it was irrational not to grant the same relief to it and concomitantly whether the Commissioner's view of Berwind's related person liability lacked a reasonable basis.

Elec. Co., 358 F. Supp. 731, 741-42 (S.D.N.Y. 1973) (significant change in Supreme Court antitrust doctrine).

Eastern Enterprises did not overrule or change Takings or Due Process jurisprudence. The plurality expressly stated that it was applying "factors that traditionally have informed our regulatory takings analysis," Eastern Enterprises, 118 S. Ct. at 2149, and Justice Kennedy stated that his opinion was based on "settled due process principles." Eastern Enterprises, 118 S. Ct. at 2158 (Kennedy, J., concurring).

Although there literally has been no change in the pertinent principles of constitutional law, the "legal atmosphere" has been dramatically altered as to companies in a substantially identical position to Eastern. Eastern Enterprises reflects a significant new application of legal principles to a set of facts. This intervening clarification of the constitutional rights of persons in Berwind's position constitutes a "sufficient change in the legal climate to render inapplicable in the instant proceeding the doctrine of collateral estoppel." Sunnen, 333 U.S. at 606.[13]

C. Plaintiff's Administrative Procedure Act Claim

Once the Commissioner elected for equitable or practical reasons to vacate the assignment of Combined Fund beneficiaries to all companies who were similarly situated to Eastern, he must employ that standard and make each individual decision is a rational manner.[14]

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[13] The Commissioner did not appear to believe that Berwind I precludes post-Eastern Enterprises relief when he voided the assignments of beneficiaries to Berwind's co-plaintiffs in that case.

[14] It appears that the Commissioner has not voided the assignments of 1992 Plan beneficiaries and it is not clear from the record presented whether or not Berwind's letters of July 15, 1998 and August 21, 1998

The Commissioner's decision not to grant relief to Berwind and to assign additional beneficiaries to it is reviewable as a final agency action under the APA. See 5 U.S.C. § 704; Dixie Fuel Company v. Commissioner of Social Security, 171 F.3d 1052, 1058 (6th Cir. 1999)(assignment of beneficiaries judicially reviewable under the APA); Bellaire Corp. v. Shalala, 995 F. Supp. 125, 145 (D.D.C. 1997)("decision to assign beneficiaries to [a signatory or related person] pursuant to the Coal Act is a final agency decision and hence, reviewable under the APA"). A final agency decision may be set aside by the court if the decision was "arbitrary and capricious, an abuse of discretion, or not in accordance with the law." 5 U.S.C. § 706(2)(A).

A decision is arbitrary and capricious if it lacks a reasonable basis. See Dewitt v. Penn-Del Directory Corp., 106 F.3d 514, 522 (3d Cir. 1997). A decisionmaker abuses his discretion when he makes a decision that is arbitrary or irrational. See In re Paoli Railroad Yard PCB Litigation, 113 F.3d 444, 453 (3d Cir. 1997). A reviewing court must determine whether the agency articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made. See Motor Vehicle Mfrs Ass'n of the United States, Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 42 (1983) Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962).

The explanation of the Commissioner for his action, as articulated in the federal defendants' motion for summary judgment, is that unlike Eastern, Berwind has a related

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requested such action. It is also unclear from the record presented whether the Commissioner voided his assignments effective September 24, 1998, the date of the Eastern Enterprises decision (June 25, 1998) or some earlier date.

person (Reitz) whose "status as a 1974 signatory is imputed to Berwind." This factual distinction has no rational connection to the choice to assign to Berwind beneficiaries who worked for it prior to June 1962 when it ceased coal operations. As noted, the related person provision had nothing to do with the challenged assignments to Berwind. That Berwind has a related person under the Coal Act does not rationally support a finding that Berwind agreed to pay lifetime benefits for its own retirees who Berwind employed prior to 1963.

To impute to Berwind a signature or a promise by Reitz twelve years after Berwind ceased its coal operations is inconsistent with the reasoning in Eastern Enterprises and is not reasonable in the wake of that decision. The promises made by Reitz in 1974 and thereafter were made to its employees and not to persons employed by Berwind prior to 1963.

There is no rational connection between the related person provision and the Commissioner's assignment to Berwind of beneficiaries who worked for it prior to its cessation of operations in 1962. Berwind's mere status as a related person to Reitz is not a rational basis for deciding that Eastern and Berwind are not similarly situated or in a substantially identical position with regard to the assignment of such beneficiaries.

The decision to deny the relief requested by Berwind on the basis of its related person status vis-a-vis Reitz was arbitrary and capricious and an abuse of discretion.

D. Plaintiffs Recoupment Claims

1. Coal Act Claim

Plaintiff cannot sustain its claim for a refund predicated on the Coal Act, 26 U.S.C. § 9706(f)(3).

Section 9706(f)(2) requires the Commissioner to conduct a review of an assignment if requested. Section 9706(f)(3) requires the Commissioner, if he determines after a review pursuant to paragraph (2) that there was an error, to notify the assigned operator and the Combined Fund trustees of that error and requires the trustees then to refund premiums paid. There is no allegation, however, that the Commissioner determined that the assignments challenged by Berwind were made in error. To the contrary, plaintiff alleges that the Commissioner declined to make such a determination.

Any determination by the Commissioner pursuant to § 9706(f)(2) or (f)(3) is "final." See 26 U.S.C. § 9706(f)(4). Any challenge to that decision had to be under the APA.

Section 9706(f)(6) which does provide for private civil actions is limited to suits between operators for indemnification or to enforce contractual arrangements. See Eastern Enterprises, 118 S. Ct. at 2150; Anker, 177 F.3d at 177.

2. ERISA Claim

The Coal Act provides that § 4301 of ERISA shall apply to any claim arising out of obligations to pay any amount required by the Act. See 26 U.S.C. § 9721. Section 4301 of ERISA provides that a "plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with

respect to a multiemployer plan . . . may bring an action for appropriate legal or equitable relief, or both." 29 U.S.C. § 1451. The phrase "under this subtitle" refers to Subtitle E, "Special Provisions for Multiemployer Plans." Thus, § 1451 creates a private cause of action under ERISA only for violations of 29 U.S.C. §§ 1381 through 1453. See Steiner elec. Co. v. Central States, Southeast and Southwest Areas Pension Fund, 1995 WL 399517, *6 (N.D. Ill. June 29, 1995).[15]

Berwind asserts that it is entitled to a refund pursuant to § 4221(d) of ERISA. That section provides for adjustments to payments made following the resolution of disputes through arbitration. There is no showing or allegation that the parties ever submitted this dispute to arbitration and this section is thus inapplicable.[16]

Plaintiff cannot maintain an action for a refund under § 1401(d). Moreover, none of the sections under which a cause of action may be maintained under § 1451 allows employers to recover overcontributions. Indeed, no ERISA provision provides for or implies such a cause of action. See Plucinski v. I.A.M. Nat'l Pension Fund, 875 F.2d 1052, 1055-56 (3d Cir. 1989). See also Jamail, Inc. v. Carpenters Dist. Council of Houston Pension & Welfare Trusts, 954 F.2d 299, 302 (5th Cir. 1992); Kwatcher v. Massachusetts

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[15] The United States cannot in any event be sued under ERISA as it has not waived sovereign immunity against ERISA claims. See Shanbaum v. United States, 32 F.3d 180, 182 (5th Cir. 1994).

[16] The section provides that "[p]ayments shall be made to an employer in accordance with the determinations made under this part until the arbitrator issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination." 29 U.S.C. § 1401(d).

Service Employees Pension Fund, 879 F.2d 957, 964 (1st Cir. 1989).

If "a contribution or payment is made by an employer to a multiemployer plan by a mistake of fact or law," ERISA "does not prohibit the return of such contribution or payment to the employer." 29 U.S.C. § 1103(c)(2)(A)(ii). This section, however, "neither requires such refunds to be made nor provides employers a right of action against the fund if such refunds are not made." Plucinski, 875 F.2d at 1055.

3. Restitution Claim

Courts have resorted to federal common law to fill the interstices in ERISA. An employer can maintain an equitable cause of action for the recovery of payments erroneously paid due to a mistake of fact or law. See Luby v. Teamsters Health, Welfare, and Pension Trust Funds, 944 F.2d 1176, 1186 (3d Cir. 1991); Plucinski, 875 F.2d at 1057.

An action for restitution requires the application of equitable principles and thus the court may deny recovery when it would be inequitable to grant it. Plucinski, 875 F.2d at 1058. An important factor in determining whether restitution is equitable is the financial impact such relief would have on the plan. See Luby, 944 F.2d at 1186; Plucinski, 875 F.2d at 1058. This and other equitable considerations cannot be assessed with any confidence from the record presented by the parties who have not even addressed this claim in the seven briefs filed among them.

4. Tax Refund Claim

The United States has waived sovereign immunity for "[a]ny civil action against the United States for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected." 28 U.S.C. § 1346(a)(1).

Congress enacted a tax refund statute consistent therewith. See 26 U.S.C. § 7422.

No suit to recover a tax erroneously or illegally assessed or collected may be maintained, however, "until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulation of the Secretary established in pursuance thereof." 26 U.S.C. § 7422(a). No suit by a taxpayer "under § 7422(a) for the recovery of any internal revenue tax, penalty or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time." 26 U.S.C. § 6532(a).

Berwind filed refund claims with the IRS between July 24, 1998 and November 19, 1998 for all payments made to the Combined Fund between April 4, 1995 and June 30, 1998. The requisite six month period had not expired for any of these claims at the time this suit was filed, and only two had expired at the time Berwind filed its amended complaint. Each claim, however, has now been pending over six months. It would be pointless to require that plaintiff again amend its complaint to plead this fact when the government has taken a fixed position on the refund claims and no substantive rights would be affected.

A claim for a tax refund must be filed within two years from the time the tax was paid. See 26 U.S.C. § 6511(a). It appears from the schedule of requested refunds submitted by plaintiff that it filed timely refund claims only for premiums paid on and after August 22, 1996. Plaintiff's claim for a refund of premiums paid between April 1995 and July 1996 are barred. See United States v. Dalm, 494 U.S. 596, 602 (1990) ("unless a claim for refund of a tax has been filed within the time limits imposed by § 6511(a), a suit for refund, regardless of whether the tax is alleged to have been

'erroneously,' 'illegally,' or 'wrongfully collected,' may not be maintained in any court").

The United States contends that plaintiff may not obtain a refund of any premium under the tax refund statute in any event because the premiums are not taxes. The law of this Circuit is to the contrary. See Unity, 178 F.3d at 675 ("Coal Act obligations are taxes"). See also Pittston Company v. United States, 199 F.3d 694, 702-04 (4th Cir. 1999) (Coal Act premiums are taxes subject to recovery from U.S. in tax refund action); In re Chateaugay Corp., 53 F.3d 478 498 (2d Cir. 1995).

E. The Trustees' Counterclaims

Although the Combined Fund trustees were parties in Berwind I and Eastern Enterprises, preclusion is not an issue with regard to the Trustees' request for declaratory relief in Count I of the counterclaims.[17] For the reasons set forth in section IV.A.1 of this memorandum, the Trustees are not entitled to a declaration that the Coal Act has been constitutionally applied to plaintiff.

It follows that the Trustees also are not entitled to summary judgment on their counterclaims for premium payments in Counts II, III or IV with one caveat. It appears that plaintiff ceased making payments after June 25, 1998 even for the five assigned Combined Fund beneficiaries formerly employed by Reitz for whom plaintiff has acknowledged related person liability. If this is confirmed and the amounts owed are identified, the Trustees would be entitled to judgment on Counts II and IV with regard to those beneficiaries.

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[17] Plaintiff has not asserted preclusion of any kind in its answer to Count I. See Fed. R. Civ. P. 8(c).

V. Conclusion

Because plaintiff's claims for declaratory relief in Counts I, II and III are technically barred by claim preclusion principles, plaintiff's motion for partial summary judgment will be denied and the federal defendants' motion for summary judgment as to Counts I, II and III will be granted. Because plaintiff cannot sustain its claims for refunds under the Coal Act or ERISA, the federal defendants' motion for summary judgment will also be granted as to Counts IV and VII. Because plaintiff stands in a substantially identical position as Eastern with regard to the assignment of its own former employees, the federal defendants' motion will be denied as to the claims in Counts V, VI and VIII. For the same reason, the Trustees' motion for summary judgment on their counterclaims will be denied, without prejudice to renew as to Counts II and IV with regard to any premiums owed by plaintiff for assigned beneficiaries formerly employed by Reitz.

An appropriate order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BERWIND CORPORATION	:	
	:	
v.	:	
	:	
KENNETH S. APFEL, UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND, MICHAEL H. HOLLAND, WILLIAM P. HOBGOOD, MARTY D. HUDSON, THOMAS O.S. RAND, ELLIOT A. SEGAL, CARL E. VAN HORN, GAIL R. WILENSKY, as Trustees of the United Mine Workers of America Combined Benefit Fund, THE UNITED STATES OF AMERICA, THE UNITED MINE WORKERS OF AMERICA 1992 BENEFIT PLAN and MICHAEL H. HOLLAND, MARTY D. HUDSON, ELLIOT A. SEGAL, A. FRANK DUNHAM, as Trustees of the United Mine Workers of American 1992 Benefit Plan	:	**CIVIL ACTION** **NO. 98-5985**

ORDER

AND NOW, this 31st day of March, 2000, upon consideration of plaintiff's Motion for Partial Summary

Judgment (Doc. #13), the Motion of defendant Apfel and the United States for Summary Judgment (Doc. #15) and the Motion of the United Mine Workers Combined Benefit Fund, 1992 Benefit Plant and their Trustees for Summary Judgment (Doc. #16), consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that plaintiff's Motion is **DENIED**; the Motion of defendant Apfel and the United States is **GRANTED** as to plaintiff's claims in Counts I, II, III, IV and VII and is otherwise **DENIED**; and, the Motion of the United Mine Workers Combined Benefit Fund, 1992 Benefit Plan and their Trustees is **DENIED**, without prejudice to renew as to Counts II and IV of their counterclaims with regard to any premiums owed by plaintiff for assigned beneficiaries formerly employed by Reitz Coal Company.

BY THE COURT:

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JAY C. WALDMAN, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BERWIND CORPORATION	:	
	:	
v.	:	
	:	
KENNETH S. APFEL, UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND, MICHAEL H. HOLLAND, WILLIAM P. HOBGOOD, MARTY D. HUDSON, THOMAS O.S. RAND, ELLIOT A. SEGAL, CARL E. VAN HORN, GAIL R. WILENSKY, as Trustees of the United Mine Workers of America Combined Benefit Fund, THE UNITED STATES OF AMERICA, THE UNITED MINE WORKERS OF AMERICA 1992 BENEFIT PLAN and MICHAEL H. HOLLAND, MARTY D. HUDSON, ELLIOT A. SEGAL, A. FRANK DUNHAM, as Trustees of the United Mine Workers of American 1992 Benefit Plan	:	**CIVIL ACTION** **NO. 98-5985**

MEMORANDUM

Plaintiff challenged its assigned liability under the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act") to fund lifetime health benefits for retired members of the UMWA and certain of their dependents through required premium payments to the UMW Combined Benefit Fund ("Combined Fund") and 1992 Benefit Plan ("1992 Plan").

Plaintiff, the Federal Defendants and the Trustees previously filed motions for summary judgment on some of the various claims asserted by or against them. By memorandum and order of March 31, 2000, the Court addressed those motions and the claims asserted in Counts I, II, III, IV, V and VII of the Complaint, and in Counts I, II, III and IV of the Counterclaims. The prevailing parties, however, had not all moved for judgment in their favor on some of the respective claims.[1] The parties have now moved for summary judgment on all pending claims and counterclaims, and the court will enter judgment consistent with this memorandum and that of March 31, 2000. In doing so, the court will address briefly only those claims and issues left open in the March 31, 2000 opinion which have now been fully briefed by the parties.

Plaintiff's Tax Refund Claim (Count VIII)

Plaintiff asserted a tax refund claim against the United States pursuant to 26 U.S.C. § 7422 for premiums paid to the Combined Fund from April 4, 1995 until June 30, 1998 when it unilaterally ceased making payments in light of Eastern Enterprises. Plaintiff suggests that the court

[1] This appears to have been an oversight as the parties at least implicitly argued entitlement to judgment in their favor in their opposition to those motions filed by an adversary.

concluded in its March 31, 2000 opinion that plaintiff is entitled to a tax refund from the United States for those premiums. The court did not do so. The court merely addressed the only argument then advanced by the United States for summary judgment which was that Coal Act premiums are not taxes.

The court noted that the Third Circuit has declared that these premiums are "taxes." See Unity Real Estate Co. v. Hudson, 178 F.3d 649, 675 (3d Cir. 1999). The court also recognizes the only circuit court squarely to address the issue has held that a tax refund claim could be maintained against the United States for erroneously assessed Coal Act premiums. See Pittson Co. v. United States, 199 F.3d 694, 702-04 (4th Cir. 1999). In such circumstances, the court cannot conscientiously hold that Coal Act premiums are not "taxes," and is reluctant to hold that they nevertheless are not recoverable under the tax refund statute. The court notes, however, that Congress twice declined to enact tax measures to provide for miners' benefits and that the dissenting opinion in Pittson is far from unpersuasive on the question of Berwind's entitlement to a refund from the United States Treasury.

In any event, the court need not resolve this issue in light of the contingent nature of the claim and the Trustees' concession regarding plaintiff's restitution claim against the Funds.[2]

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[2] As explicitly pled, plaintiff sought a refund from the United States only in the event it was unable to recoup the premium payments from the Funds. The Trustees acknowledge in footnote 6 of their brief of August 3, 2000 that to the extent recoupment is required, it should be from the Funds and not from the United States Treasury.

Plaintiff's Restitution Claim (Count VI)

Plaintiff asserted federal common law claims for restitution against the Funds and the Trustees to recover premiums paid to the Funds since April 4, 1995, and against the United States should plaintiff fail to obtain restitution from the Funds. As plaintiff is entitled to restitution from the Funds, its claim against the United States is moot.[3]

The Trustees contend that restitution should be denied on grounds of equity since it would impose an undue financial burden on the Funds. They note that the Funds are facing a multitude of lawsuits for refunds as a result of Eastern Enterprises and subsequent court opinions, and that the current ratio of assets to obligations is marginal.

The court is mindful of the very worthy purpose of the Funds. The court, however, cannot conscientiously differentiate plaintiff from Eastern in any regard which was pertinent to the Supreme Court's decision in Eastern Enterprises and concludes that it is not equitable to deny plaintiff recovery. As documented by plaintiff, there remain a significant number of corporations with very substantial net worth which constitutionally remain obligated to absorb premiums for beneficiaries. In a case referenced by the Trustees, a federal court barely a year ago ordered restitution to the plaintiff companies for erroneously assessed premiums in an amount exceeding $19 million. It is not particularly equitable that some parties entitled to restitution receive it while others do not based on the speed with which particular cases are litigated.

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[3] Moreover, the United States forcefully argues that it has not in any event waived sovereign immunity for such a claim, and the court notes that the United States has not been unjustly or inequitably benefitted.

Plaintiff's request for payment of interest, however, is another matter. The court does not believe that plaintiff is entitled to such a payment under the federal common law of restitution. See National Mining Ass'n v. Apfel, 97 F. Supp. 2d 1070, 1083 & n.18 (N.D. Ala. 1999).

Plaintiff's Request for Injunctive Relief

In connection with its APA claim, plaintiff seeks an order requiring the Commissioner to void assignments made to plaintiff after Eastern Enterprises. This relief is consistent with the remedies available under the APA and an order to this effect will be entered. Plaintiff also seeks a court order barring the Commissioner from reassigning any of these beneficiaries to it or to a related entity. The court will not enter such a broad order as it is not clear that none of these beneficiaries may properly be so reassigned.[4]

Counterclaims of the Funds and Trustees (Counts II and IV)

In Count II of their Counterclaims, the Funds and Trustees seek to recover from Berwind unpaid premiums for assigned Combined Fund beneficiaries since July 1998, and in Count IV they seek payment of current assessed premiums and an order requiring future payments for assigned beneficiaries. The court previously denied the motion of the Trustees and Funds for summary judgment on these Counterclaims without prejudice to renew as to those beneficiaries who were employed by or are dependents of those employed by Reitz, a "related person" to Berwind under the Coal Act.

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[4] Plaintiff, of course, may challenge any particular subsequent assignment actually made to it if it has a legitimate basis to do so.

It is uncontroverted that plaintiff is responsible and owes unpaid premiums for two Reitz assignees, Thomas Barber and Margaret Novatni, as well as Helen Walters to the time of her death on September 9, 1998. Plaintiff does not contest liability for these assignees and has agreed to pay $10,352.49 plus interest to the Combined Fund for unpaid premiums attributable to them. An order to this effect will be entered.

Cross-Claim of the United States

On August 1, 2000, the United States filed a cross-claim against the Combined Fund and its trustees for indemnification of any amounts the United States is required to refund to plaintiff for premiums paid. This contingent cross-claim is now moot and will be dismissed.

An appropriate order will be entered consistent with the foregoing and the court's memorandum and order of March 31, 2000.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BERWIND CORPORATION	:	
	:	
v.	:	
	:	
KENNETH S. APFEL, UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND, MICHAEL H. HOLLAND, WILLIAM P. HOBGOOD, MARTY D. HUDSON, THOMAS O.S. RAND, ELLIOT A. SEGAL, CARL E. VAN HORN, GAIL R. WILENSKY, as Trustees of the United Mine Workers of America Combined Benefit Fund, THE UNITED STATES OF AMERICA, THE UNITED MINE WORKERS OF AMERICA 1992 BENEFIT PLAN and MICHAEL H. HOLLAND, MARTY D. HUDSON, ELLIOT A. SEGAL, A. FRANK DUNHAM, as Trustees of the United Mine Workers of American 1992 Benefit Plan	:	**CIVIL ACTION** **NO. 98-5985**

ORDER and JUDGMENT

AND NOW, this 15th day of September, 2000, upon consideration of plaintiff's Motion for Summary Judgment

(Doc. #26), the Motion of defendant Apfel and the United States for Summary Judgment (Doc. #28) and the cross-Motion of the United Mine Workers Combined Benefit Fund, 1992 Benefit Plan and their Trustees for Summary Judgment (Doc. #30), consistent with the accompanying memorandum and with the Court's memorandum and order of March 31, 2000, **IT IS HEREBY ORDERED** that plaintiff's Motion is **GRANTED** as to the claims in Counts V and VI against the Funds and Trustees, and as to the Counterclaims in Counts I, II, III and IV except as to the claims for payment in Counts II and IV for assignees who worked or are dependents of those who worked for Reitz; the Motion of defendant Apfel and the United States is **GRANTED** as to the claims in Count VI and VII; and, the Motion of the United Mine Workers Combined Benefit Fund, 1992 Benefit Plan and their Trustees is **GRANTED** as to the claims for payment in Counterclaim Counts II and IV for Reitz assignees and is otherwise **DENIED;** and accordingly, **JUDGMENT** is **ENTERED** in the above action for the defendants and against plaintiff on the claims in Counts I, II, III, IV and VII; for plaintiff and against defendant Apfel on the APA claim in Count V, and the Commissioner shall thus void the challenged assignments to plaintiff; for defendant United States and against plaintiff on the restitution claim in Count VI; for plaintiff and against the Combined Fund and its Trustees on the restitution claim in Count VI in the amount of $14,389,103.87; for plaintiff and against the 1992 Benefit Plan and its Trustees on the restitution claim in Count VI in the amount of $35,597.12; for defendant United States and against plaintiff on the tax refund claim in Count VIII; for Counterclaim defendant Berwind and against Counterclaim plaintiff Funds and Trustees on the Counterclaims in Counts I and III; and, for Counterclaim plaintiff Combined Benefit Fund and its Trustees on the Counterclaims in Counts II and IV, as they relate to the assignment of Reitz beneficiaries, in the amount

of $10,352.49 plus prejudgment interest at the legal rate; and, as all of the various claims and counterclaims have now been resolved, this case is closed.

BY THE COURT:

_____

JAY C. WALDMAN, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BERWIND CORPORATION	:	
	:	
v.	:	
	:	
KENNETH S. APFEL, UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND, MICHAEL H. HOLLAND, WILLIAM P. HOBGOOD, MARTY D. HUDSON, THOMAS O.S. RAND, ELLIOT A. SEGAL, CARL E. VAN HORN, GAIL R. WILENSKY, as Trustees of the United Mine Workers of America Combined Benefit Fund, THE UNITED STATES OF AMERICA, THE UNITED MINE WORKERS OF AMERICA 1992 BENEFIT PLAN and MICHAEL H. HOLLAND, MARTY D. HUDSON, ELLIOT A. SEGAL, A. FRANK DUNHAM, as Trustees of the United Mine Workers of American 1992 Benefit Plan	:	**CIVIL ACTION** **NO. 98-5985**

ORDER

AND NOW, this 15th day of September, 2000, as the Cross-Claim for indemnification asserted by the United

States (Doc. #29) was contingent and is now moot in view of the court's memorandum and order of this date, **IT IS HEREBY ORDERED** that the Cross-Claim Complaint filed by the United States herein is **DISMISSED**.

BY THE COURT:

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JAY C. WALDMAN, J.

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Coal Industry Retiree Health Benefit Act of 1992 provides in pertinent part:

> **9701. Definitions of general applicability**
> * * * *
> **(c) Terms relating to operators.**--For purposes of this section--
> **(1) Signatory operator.**--The term "signatory operator" means a person which is or was a signatory to a coal wage agreement.
> **(2) Related persons.**--
> **(A) In general.**--A person shall be considered to be a related person to a signatory operator if that person is --
> (i) a member of the controlled group of corporations (within the meaning of section 52(a)) which includes such signatory operator;
> (ii) a trade or business which is under common control (as determined under section 52(b)) with such signatory operator; or
> (iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.

A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).

(B) Time for determination.--The relationships described in clauses (i), (ii), and (iii) of subparagraph (A) shall be determined as of July 20, 1992, except that if, on July 20, 1992, a signatory operator is no longer in business, the relationships shall be determined as of the time immediately before such operator ceased to be in business.

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9706. Assignment of eligible beneficiaries

(a) In general.--For purposes of this chapter, the Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business in the following order:

(1) First, to the signatory operator which--

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.

(2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which--

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.

(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

(b) Rules relating to employment and reassignment upon purchase.--For purposes of subsection (a)--

(1) Aggregation rules.--

(A) Related person.--Any employment of a coal industry retiree in the coal industry by a signatory operator shall be treated as employment by any related persons to such operator.

26 U.S.C. §§ 9701(c)(1) & (2), 9706(a)(1), (2), (3) & (b)(1)(A).

26 U.S.C. § 52 provides in pertinent part:

(a) Controlled group of corporations.--For purposes of this subpart, all employees of all corporations which are members of the same controlled group of corporations shall be treated as employed by a single employer. In any such case, the credit (if any) determined under section 51(a) with respect to each such member shall be its proportionate share of the wages giving rise to such credit. For purposes of this subsection, the term "controlled group of corporations" has the meaning given to such term by section 1563(a), except that--

(1) "more than 50 percent" shall be substituted for "at least 80 percent" each place it appears in section 1563(a)(1), and

(2) the determination shall be made without regard to subsections (a)(4) and (e)(3)(C) of section 1563.

26 U.S.C. § 52.

26 U.S.C. § 1563(a) provides in pertinent part:

(a) Controlled group of corporations.--For purposes of this part, the term "controlled group of corporations" means any group of--

(1) Parent-subsidiary controlled group.--One or more chains of corporations connected through stock ownership with a common parent corporation if--

(A) stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of each of the corporations, except the common parent corporation, is owned (within the meaning of subsection (d) (1)) by one or more of the other corporations; and

(B) the common parent corporation owns (within the meaning of subsection (d) (1)) stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of at least one of the other corporations, excluding, in computing such voting power or value, stock owned directly by such other corporations.

26 U.S.C. § 1563(a).

The Administrative Procedure Act provides in pertinent part:

704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

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706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. §§ 704, 706.